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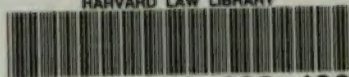
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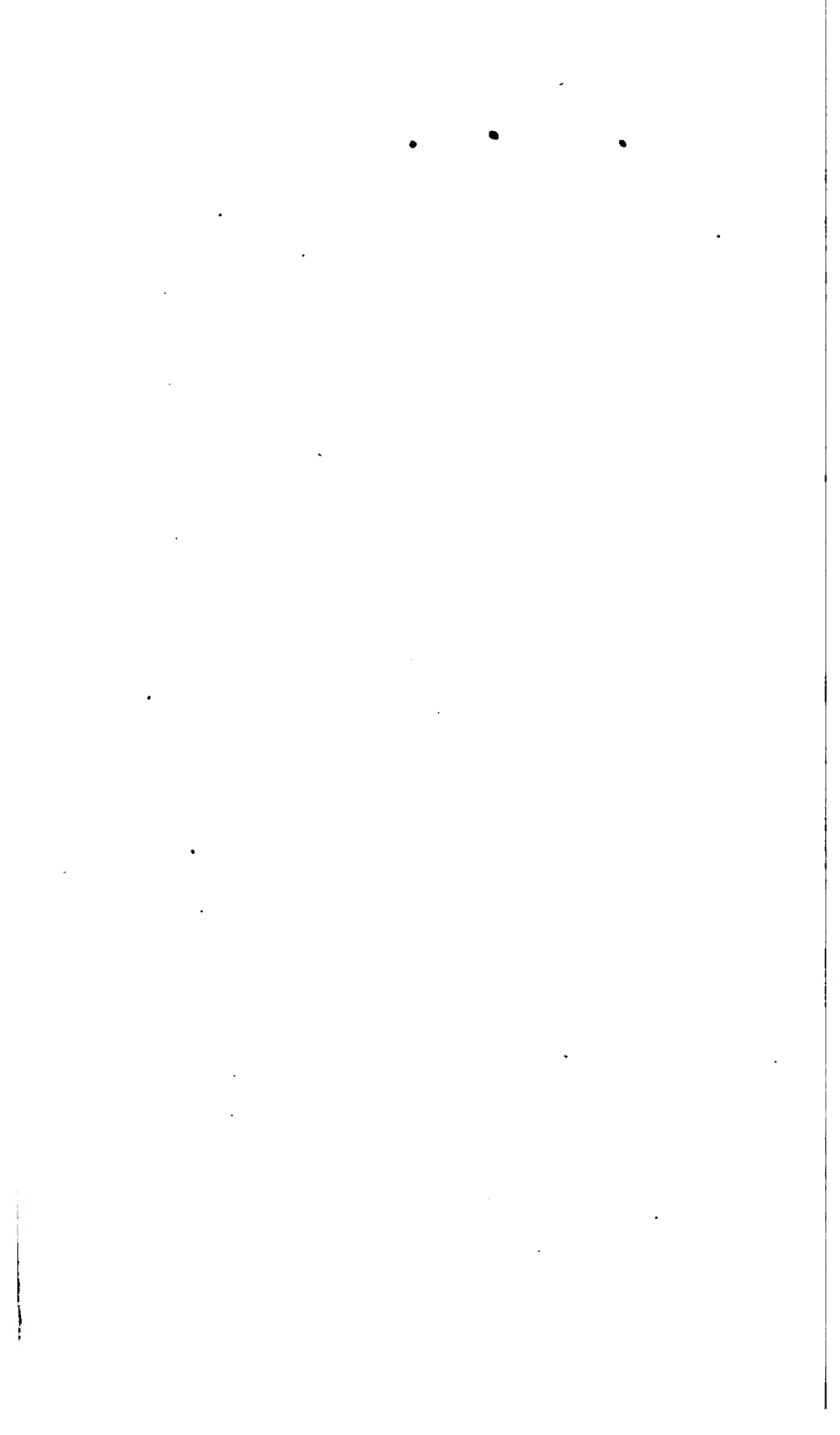
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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE COURT OF APPEALS

OF

VIRGINIA.

VOL. II.

BY PEYTON RANDOLPH,
COUNSELLOR AT LAW.

2 Randolph

1813-14

3

23 Va.

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.....

1824.

District of Virginia, to wit:

BE IT REMEMBERED, That on the eighth day of July, in the forty-ninth year of the Independence of the United States of America, PETER COTTOM, of the said district, hath deposited in this office, the title of a book, the right whereof he claims as proprietor, in the words following, to wit:

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R'D. JEFFRIES,
Clerk of the District of Virginia.

JUNE 11-1929

L R R

134

JUDGES
OF THE
COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS.



WILLIAM FLEMING, Esquire, President.*

FRANCIS T. BROOKE, Esquire.†

WILLIAM H. CABELL, Esquire.

JOHN COALTER, Esquire.

JOHN W. GREEN, Esquire.

DABNEY CARR, Esquire.‡

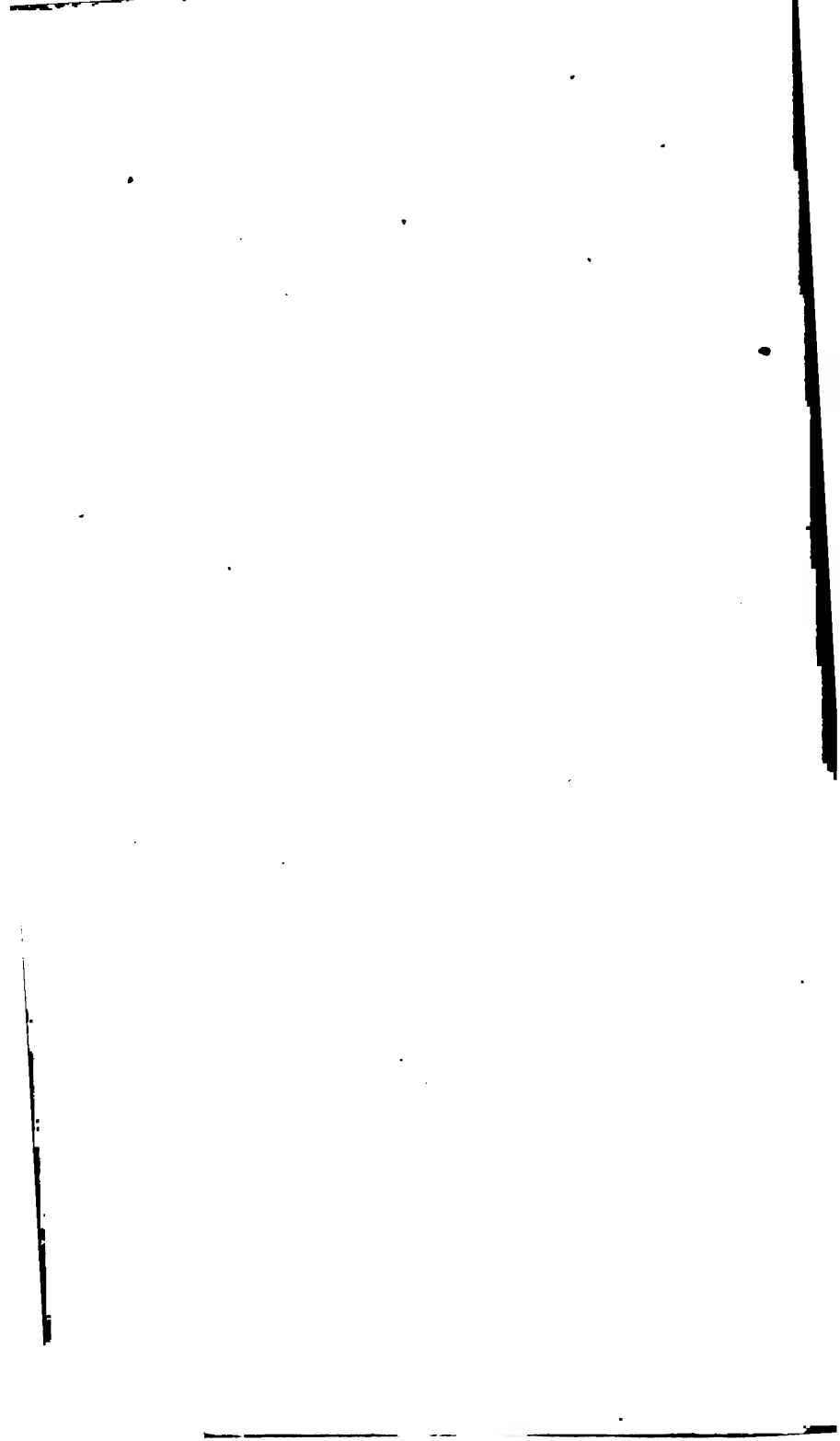
ATTORNEY GENERAL.

JOHN ROBERTSON, Esquire.

* The infirmities of Judge FLEMING, rendered him unable for many years, to sit in Court, and he departed this life on the 15th day of February, 1824.

† Who became President of the Court on the death of Judge FLEMING.

‡ Who was appointed February 24th, 1824, to supply the vacancy occasioned by the death of Judge FLEMING.



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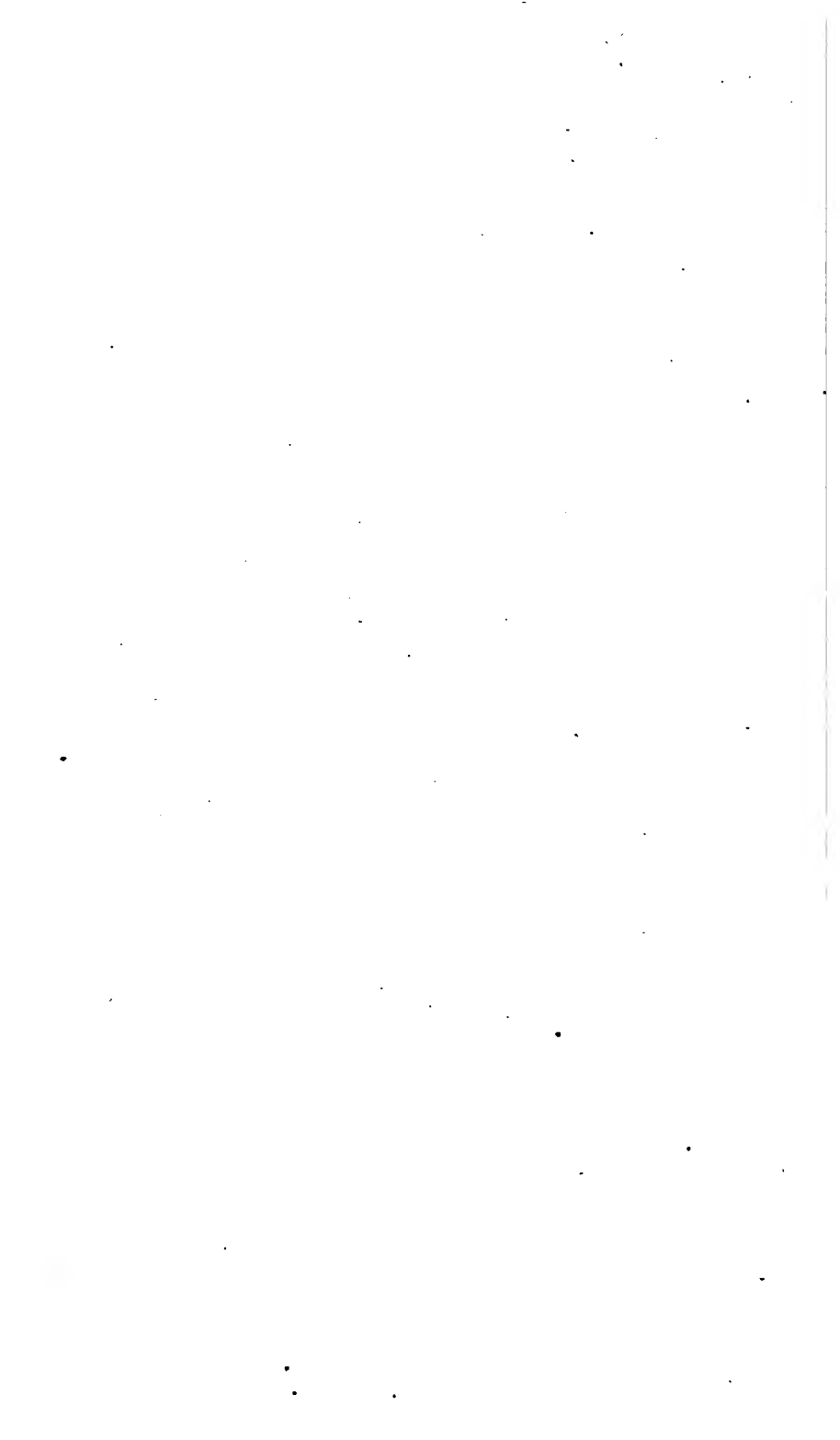
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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

KYLES v. FORD.

1823.
November.

It seems, that where a scire facias against bail is returnable to a rule-day, the day of return and of appearance are the same. If the writ is returnable to the first day of a Court, and that happens to be a rule-day, that day is also the appearance-day.

But, if a scire facias is made returnable to a rule-day, and the same day is the first day of the Court, the writ is merely void; for, in that case, it can only be properly returnable to the first day of the Court.

Process made returnable to a day which is not a return-day, is void; and a scire facias cannot be amended.

This was an appeal from the Superior Court of Law for Cumberland county, where H. & R. Kyle sued out a writ of *scire facias* against H. Ford, as special bail for T. Haskins, against whom a judgment had been obtained, and a *capias ad satisfaciendum* returned "not found."

VOL. II.

1823. The *scire facias* was dated on the 26th day of April,
November. 1820. The appearance-day was the first Monday of May
 following "before the Judge of our Superior Court of Law
 of Cumberland, at the court-house, that being the rule-day,
 to be holden in the Clerk's office of said county, &c."

Kyles
 v.
 Ford.

The writ was executed on the 29th day of April, 1820.

On the first day of May, the defendant not appearing, a conditional judgment was entered up against him, at the rules, unless he should appear at the next rule-day.

On the 4th day of May, Ford, the defendant, came into Court, and surrendered Haskins, his principal; whereupon, the Court discharged Ford from his recognizance of bail, and gave judgment against him for the costs of the *scire facias*.

To this judgment the plaintiff filed a bill of exceptions, setting forth the foregoing facts, and stating, that it was proved, that the *scire facias* was returned executed on Monday, the 1st of May, 1820, which was the first day of the term of the Superior Court of Law.

The plaintiffs appealed.

W. Hay, Jr. and Call, for the appellants.

No Counsel, for the appellee.

November 7. Judge GREEN. The act of 1819, 1 *Rev. Code*, p. 502, relating to the proceedings in civil cases, provides, that special bail shall be discharged by the surrender of the principal, in Court, or to the Sheriff, at any time before the appearance-day of the first *scire facias* returned "executed," or of the second returned "nihil." The laws in force before this statute took effect, prescribed, that the appearance-day should, in all cases, be the day after the Court to which the process was returnable, and that was also the rule-day. The statute of 1819 does not, in terms, appoint any appearance-day; but, it may be inferred from various provisions of the statute, and indeed results from the terms of the writ, in the absence of any

express provision on the subject, that the appearance-day is the return-day of the writ, if, according to law, an appearance can then be entered ; or if not, then the first day thereafter on which an appearance can be entered. Thus, when the writ is returnable to the rules, the return-day is the appearance-day, as an appearance can be then entered at the rules. If the writ be returnable to the first day of the Court, and the same day be the rule-day, it is also the appearance-day ; since an appearance may then be entered at the rules. But, if it be not also rule-day, then the next rule-day succeeding, is the appearance-day ; for, that is the earliest day at which an appearance can be entered, and a rule given or received by the defendant. If, therefore, the *scire facias* in the case under consideration was, as is contended by the appellant's counsel, returnable to the first day of the Court, it would follow, that the surrender of the principal by the bail in this case, was not within the time prescribed by the act ; and, consequently, the order exonerating the bail, erroneous. These are my impressions. But I give no decisive opinion on these points, as they are not involved in this case.

The act of 1819 required, that the forms of writs should be assimilated as nearly as may be, to the forms theretofore used in the General Court. The writs used in the General Court, were uniformly returnable *in terms*, "to the first day of the June Court, or November Court next," as the case might be, without specifying the time when the Court would sit, which would have been entirely superfluous. When a writ issued in a Superior Court, returnable to the first day of the next Court, there was no necessity for departing, in any degree, from the terms of the writ used in the General Court. But, if it were returnable to a rule-day, it was necessary to vary the terms of the writ, so as to make it returnable to a certain day specified to be the rule-day. This is the form of the *scire facias* in question. It is made returnable to "the first Monday in May, that being the rule-day," and it is not stated that the first Monday in

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1823. May was the first day of the Court. The requisition to appear before the Judge is; I presume, common to writs returnable to the first day of the Court, and to the rule-day. In the latter case, there is no occasion to drop this mandate from the form of writs used in the General Court. By law, the Superior Court of Cumberland is to be holden on the first Monday after the fourth Monday in April and September. If the Clerk, in adopting a form for writs returnable to the first day of the next Court, had thought it necessary to specify the time at which the Court was to be holden, he would, of course, adopt some expression which would have been always correct, and probably have followed the terms of the law prescribing the time for holding the Court, and varied it only from necessity. As, if a writ were issued in April, he would have inserted "this month," instead of "April next." He could not, with propriety, have made writs intended to be returnable to the first day of the Court, returnable to the first Monday in May and October, uniformly; for, the Court must frequently sit on the last Monday in April and September. But writs intended to be returnable to the rule-day, might be returnable to the first Monday in May, as that was always a rule-day. I have no doubt, that the Judge examined the forms of writs used in that Court, and ascertained that the *scire facias* in question, was intended to be returnable, and was in fact returnable, to the rule-day, and not to the Court. The act of 1819, before cited, directs that all process shall be returnable either to the first day of the next Court, or to some *previous* rule-day. The process in this case was not returnable either to the Court, or to a *previous* rule-day; the rule-day to which it was returnable, and the first day of the Court, being the same. The consequence is, that the *scire facias* was merely void. Process made returnable to a day which is not a legal return-day, is void; 2 *Black. Rep.* 846; and a *scire facias* cannot be amended; *Strange*, 411; although a *feri facias* may be amended in the *teste* or *return*; *Tidd's Practice*, 391. The sur-

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render, therefore, in this case, was in good time, and the order discharging the bail, proper. The error in giving a judgment against the defendant for the costs of the *scire facias*, was beneficial to the plaintiffs, and they cannot complain of it. The appellee does not complain. I think the judgment should be affirmed.

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Judges COALTER and BROOKE concurred ; and the judgment was accordingly *affirmed*.*

* Judge Cabell absent, from indisposition.

BROADDUS and WIFE v. TURNER.

1823.
November.

Where an appeal is allowed by the Court of Chancery, and an indefinite time given for executing the appeal bond, the appeal is irregular.

This was a motion by the appellant to docket an appeal from the Fredericksburg Chancery Court. The appeal was allowed in the Court below in May, with liberty to give bond and security, without any limitation of time within which the bond should be executed.

Stanard, for the appellant.

November 14. Judge BROOKE, delivered the opinion of the Court, that the allowance of an indefinite time to give bond in the Clerk's office to prosecute the appeal, was irregular, and the motion was, therefore, over-ruled.

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MORRIS and others v. TERRELL.

A purchaser from an agent empowered to sell real property, cannot insist on the validity of such sale, if he had knowledge of any fraud or breach of trust in the agent.

The failure of the purchaser to inspect the writing authorising an agent to sell real property, will affect him with notice of any defects or qualifications contained in such writing.

A purchaser who is evicted, is not entitled to compensation for improvements, unless the owner has been guilty of a fraud, by permitting such improvements, without giving notice to the possessor, or of gross *laches* in asserting his claim after he is apprized of it.

A decree may be rendered between co-defendants, where their respective rights and obligations are ascertained and established by the pleadings and proofs between the *plaintiff* and all the defendants.

This suit was originally brought in the County Court of Campbell, and afterwards removed by *certiorari* to the Lynchburg Chancery Court.

The bill was exhibited by Micajah Terrell against Charles L. Terrell, Robert Morris and John Lynch, setting forth the following case :

That Micajah Terrell, the complainant, had purchased of John Lynch a lot of ground in Lynchburg, and executed his bond for the purchase money, in discharge of which the complainant made sundry payments and remained indebted only in the sum of _____ : that he deferred calling on Lynch for a deed, until the aforesaid balance should be paid : that some time afterwards, the complainant (then living in the western country,) wrote a letter to Charles L. Terrell, requesting him to sell a tract of land belonging to the complainant, lying in the county of Campbell ; but, according to his best recollection, he never gave Charles authority to sell the Lynchburg lot ; or, if such power were given, it was a *special* power to sell only *for cash* : that notwithstanding, the said Charles sold the said lot to one Robert Morris, to whom he was indebted, and the sale was made by Charles in discharge of the debt from him to Morris : that Morris induced Lynch (in whom

the legal title resided) to make him a conveyance of the said lot, by representing that Charles Terrell had been compelled to pay a large sum of money as surety for the complainant, whereas the truth is, that Charles was largely indebted to the complainant : He therefore prayed that Charles L. Terrell might be required to produce the aforesaid letter, if it was in his possession ; that he might say whether it authorised him to sell the said lot ; and if it did, whether it did not expressly restrict him to a sale *for cash* : that he might say whether he shewed the said letter to Morris : whether he was not, at the time of the sale, indebted to the complainant, and whether the lot was not sold in discharge of a debt due from the said Charles to Morris. The complainant prayed that the deed might be delivered up to be cancelled, and that Lynch might be compelled to make a deed to him, upon payment of the balance of the purchase money due for the said lot, &c.

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The answer of Morris states, that Charles L. Terrell applied to him to purchase the lot in question, alledging that he had a letter from his brother Micajah, authorising him to sell the said lot : that Charles farther represented to the respondent, that he was anxious to sell the lot to discharge an execution against himself, amounting to £ 128 12s. which had been originally the debt of the said Micajah, but to which he had made himself liable : that confiding in these statements, and believing that Charles had full power to sell the lot in question, he became the purchaser at the price of \$ 500, which was at that time thought to be a high price : that he paid in cash for the same £ 125 12s. and to John Lynch, the original proprietor, by the directions of the said Charles, the farther sum of £ ———, that being the balance due from Micajah Terrell, for the purchase of the lot ; in addition to which, the respondent held the complainant's bond for the sum of £ ———, which Charles Terrell agreed to receive, and pay the overplus beyond the \$ 500 to the respondent, when he got his crop of wheat to market : that many circumstances combined to induce him

1823. to believe that Charles had authority to sell the lot : that
November. Lynch made the conveyance to the respondent, upon his
 Morris and others
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 Terrell. paying the balance of the purchase money due upon the lot :
 that he has not the letter authorising the said Charles to sell
 the lot, in his possession, and never had : that he merely
 represented to the said Lynch what had been stated to him,
 which he believes to be true ; and that he considers the sale
 as a cash sale.

The answer of Lynch states, that the lot was sold at public auction, and the complainant became purchaser, as he understood : that the other defendant, Morris, represented to him, that he had purchased the lot of Charles L. Terrell, under an authority from Micajah Terrell : that he hesitated for some time, but upon being informed by his son, Christopher Lynch, that he had seen such a letter, and from other circumstances inducing a belief that Charles's power to sell was unquestionable, he executed the deed to Morris : that if the authority should be found deficient, he prays that Morris may be compelled to convey the lot to Micajah Terrell, and that he may be dismissed with costs, &c.

Charles L. Terrell having died, his executors answered, disclaiming any knowledge of the transaction, and exhibiting an answer, prepared and sworn to by Charles L. Terrell, before his death, as their own.

In this answer, Charles L. Terrell affirms that he received a letter from his brother Micajah, authorising him to sell the lot in question ; which letter is lost or mislaid, and the respondent has never been able since to find it : that the part of the letter relating to this subject, is, as nearly as he can recollect, as follows : “ As to the lot in Lynchburg, I do not know so well about it, unless it was sold for cash, and that laid out in young negroes :” That it is not true that the lot was sold to Morris in discharge of a debt due from the respondent to Morris ; but, in discharge of a debt of the complainant's, for which the respondent had made himself liable : that it is true, that the respondent was at

that time, and still is indebted to the complainant, in consequence of long transactions between them ; but, that as the respondent was not in the habit of keeping accounts, he did not know how the account stood : that, since the sale of the lot, a settlement has taken place between them, and the respondent found that he was indebted to the complainant upwards of \$——— : that he does not believe, that he ever shewed the letter to the defendant Morris.

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Christopher Lynch deposed, that previous to the sale to Morris, he was in conversation with Charles L. Terrell, about Micajah Terrell's lot in Lynchburg, when Charles drew out a letter which he had received from Micajah some time before, containing, as well as he recollected, these words : " it would be as well," or "*perhaps* it would be as well, to sell the lot in Lynchburg, and lay out the proceeds in young negroes," and the witness adds, " giving the said Charles *perfect discretion* about the same : " that the witness was informed by the said Charles, that there was an execution hanging over him, and that he intended to sell the said lot to discharge it, or was compelled to do so, or raise the money somehow : that the witness mentioned the said Robert Morris as being the most likely person to buy it ; which he afterwards mentioned to the said Morris : that soon after, on the same day, the sale was made by Charles to Morris, and the witness was requested by both, to apply to his father for a deed : that his father hesitated at first, because Micajah had not paid for the lot ; but, upon seeing Morris, the deed was made : that the witness told his father, that he had seen the letter from Micajah to Charles, authorising the latter to sell : that he knew the letter to be in the hand-writing of Micajah ; and, in a conversation with him some time afterwards, concerning it, he did not deny having written it, but differed a little with the witness as to the construction of it ; but, even according to his construction, it would still have given Charles a discretion to sell : that he considered the price, at that

1823. time, a fair one : that Micajah complained that Charles was
November. in his debt, and had not treated him well in selling the lot :
Morris and that, in saying that the letter gave Charles a *perfect dis-*
others *cretion* to sell, the witness only means to give his *conclu-*
v. *sion* from the words quoted above as contained in the letter.
Terrell.

John Lynch confirms most of the statements in the foregoing deposition, and says, in addition, that he has understood, both from Micajah and Charles Terrell, that the latter was indebted to the former ; and that after the payment of a debt to McClelland, there was still a balance due from Charles to Micajah : that Micajah uniformly refused to ratify what Charles had done.

McClelland gives a history of his claim against Charles L. Terrell, and says that the said debt was paid by Morris, and he understood, both from Charles Terrell and Morris, that the latter advanced this money in part payment of a lot sold by Charles for Micajah Terrell to the said Morris.

Another witness states, that the lot in question is greatly improved in value by the improvement of the main street in that part of the town ; which improvement was jointly made by Morris and others.

The Chancellor, being of opinion that Charles L. Terrell had no authority to sell the lot in question to Morris, decreed, that the said Morris should execute to the plaintiff a deed with special warranty, conveying the legal title, and surrender possession of the said lot ; and that John Lynch, senior, upon receiving from the plaintiff the balance of the purchase money due him, should execute to the plaintiff a deed of confirmation for the same, with general warranty ; and that the executors of Charles L. Terrell should pay the costs out of the estate of their testator, if any, and if not, then out of their own estates.

From this decree, the defendant, Morris, appealed.

Leigh, for the appellant.

Wickham, for the appellee.

November 22. Judge GREEN. The appellee living in Tennessee, and having an equitable title to a lot in Lynchburg, the legal title of which was in Lynch, and a tract of land in the neighbourhood, wrote to his brother, Charles Terrell, authorising him to sell the tract of land ; and it is alledged, that in the same letter, he also authorised him to sell the lot. The best, and indeed the only account, entitled to any weight, which we have of the nature and extent of this authority, is from the testimony of a witness who saw the letter, (which is lost,) and who states, that there was in it, this expression : " it would be as well," or, "*perhaps* it would be as well, to sell the lot in Lynchburg, and lay out the proceeds in young negroes." The witness states, that the letter gave to Charles a *perfect discretion* about the same. This perfect discretion was inferred by the witness from the terms of the letter, as before stated, and was not otherwise expressed, as is stated explicitly by the witness himself. Charles Terrell was then indebted to the appellee in upwards of \$800, and still continues to be indebted ; but had voluntarily and without the request of the appellee, given his bond for a debt of the appellee, amounting to £125 12s., upon which bond the creditor had sued and obtained judgment. Charles Terrell sold the lot to the appellant for \$500, professedly and with the knowledge of the purchaser, for the purpose of discharging this last mentioned debt ; and Morris paid the £125 12s. directly to the creditor. The appellant seems never to have seen the letter, and to have acted under the impression that Charles Terrell had an unlimited authority to sell and dispose of the proceeds of sale ; which impression was derived from the declarations of C. Terrell himself, and of the witness, who had seen the letter. Morris obtained from Lynch the legal title.

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This sale and appropriation of the proceeds thereof, was a breach of trust on the part of Charles Terrell, and a fraud upon the appellee. The former could not, in justice, use his voluntary engagement to pay the debt of £125 12s.,

1823. otherwise than by off-setting it against his larger debt to the
November. latter, or frustrate, under pretence that the debt ought to be
Morris and paid by Micajah Terrell, the appropriation of the proceeds
others of the sale of the lot, which the owner might have thought,
Terrell. and which probably would have been, very beneficial to
 him. The sale, as well as the appropriation of the proceeds of sale, was fraudulent and a breach of trust. The circumstances under which it was made, were calculated to prejudice the sale in respect to price. It was made by a person urged by a pressing necessity to sell, in order to relieve himself from an execution, and to a person who was apprised of this necessity. A vendor, under such circumstances, cannot expect as much for any property, as if it were known that he was under no necessity, nor even anxious to sell. It appears, by Micajah Terrell's letter, that he was entirely indifferent whether he sold or not, and Charles Terrell's necessities alone urged him to sell. The witnesses are of opinion, that the property was sold at a fair price. But, that is of no consequence. The principal had a right to the benefit of the sound discretion and unbiassed judgment of his agent, in respect to the most proper time for selling the property. And, it appears, that shortly after this sale, an inferior lot, near to that in question, was sold for \$600; and probably it was notorious, that property of that description was rising in value. The appellee has lost the benefit of this judgment and discretion, (if this sale bound him,) by the unjustifiable purpose of his agent, to appropriate the property to his own use, to serve an immediate and urgent occasion. The statement of one of the witnesses, that according to the declarations of the appellee, after the sale, Charles Terrell had a discretion to sell, means no more than that he had a discretion to sell or not, and not that he had a discretion as to the terms of the sale and appropriation of the proceeds.

Is the purchaser, under the circumstances of this case, to be affected by the fraud and breach of trust on the part of the agent? I think he is. He who deals with an agent

is bound to look to his authority. The failure of Morris to call for a sight of the letter which gave C. Terrell authority to sell, was a gross negligence, and no prudent man would, in such a case, be content with the assurances of an agent or a stranger, as to the extent of the authority, when it was so easy to have ascertained the real terms of the authority, by inspecting the letter. Such negligence is equivalent to actual notice. A man who purchases an estate subject to an equity, which the title papers disclose, is bound in the same way as if he had actual notice, although he may never have seen the title papers, and may have been assured by the vendor, and believed, that the estate was free from incumbrance. It is his folly or wilful neglect, not to have resorted to the means palpably in his power, of ascertaining the true state of the title to the property for which he had treated. If Morris had seen the letter, (and he stands in the same situation as if he had,) he would have known that C. L. Terrell was selling the property for the purpose of applying the proceeds, contrary to the instructions of his principal, and would not only have been privy, but would have been contributing, to the fraud and breach of trust on the part of the agent. I think, therefore, that the appellant cannot be protected in his purchase.

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As to the claim of the appellant to be compensated for improvements, now for the first time, and in this Court, as far as it appears, asserted, I should have thought that if the appellee had asserted a claim for rents and profits, and an account thereof had been ordered, then any permanent improvements made by the appellant, although not claimed in his answer, ought to have been allowed as a set-off against the *rents and profits*, and to no other purpose; provided, such improvements had been made before notice of the disaffirmance of the contract by the appellee. The existence of the improvements is not alluded to in the pleadings, nor is the time at which they were made, stated in the evidence; and if they were, I should not have thought the appellant entitled to claim compensation for them, under the circumstan-

1823. ces of this case, except to the extent aforesaid. In many
November. cases, a party in possession may claim a compensation for im-
 Morris and improvements against the owner, as if the latter is guilty of a
 others fraud in permitting such improvements, with a knowledge
 v. of his claim, and without giving notice thereof to the pos-
 Terrell. sessor, or is guilty of gross *laches* in asserting his claim, af-
 ter he is apprized of it. In this case the appellant was not
 faultless. The appellee disaffirmed the contract, as soon as
 he was informed of it, and promptly prosecuted his suit for
 the recovery of the property. The sale was in September,
 1809, and the answer of Morris was sworn to in July, 1810.
 The time of instituting the suit does not appear, but it must
 have been shortly after the sale.

The appellant having lost the benefit of his purchase, is
 entitled to have the money paid by him, refunded. In
 point of law his claim is against Charles L. Terrell only,
 who virtually received the money from him, upon a consi-
 deration which has failed. If C. L. Terrell had applied
 the money to the use of Micajah Terrell, although not ac-
 cording to his directions, the former would have had a claim
 against the latter to that extent, and a Court of Equity, if
 nothing further appeared, might substitute Morris to the
 rights of C. L. Terrell. But, as the latter admits that
 he was indebted to Micajah, and as it appears by the evi-
 dence that he was so indebted in a much larger sum than he
 undertook to pay for him, he has no claim against Micajah
 Terrell on that account, further than to set-off the payment
 against his debt. This right of the appellant against C. L.
 Terrell being ascertained and established by the pleadings
 and proofs between the plaintiffs and all the defendants, a
 decree ought to have been rendered in favor of the appel-
 lant, against the representatives of Charles L. Terrell, for
 the amount paid by him to said Terrell on account of the
 purchase. The case of *Chamley v. Lord Dunsanny and*
others, 2 Sch. and Lef. 690, cited at the bar, fully supports
 the proposition, that in such a case a decree may be made
 between co-defendants. And this does not conflict with the

decision in the case of *Taliaferro v. Minor*, in this Court. 1823.
 The Court did not in that case declare, that no decree could November.
 be pronounced in *any* case between co-defendants ; but that Morris and
 it was improper in *that* case. others
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With this variation, I think the decree should be affirmed,
 and the appellant should pay to the appellee his costs.

Judge COALTER. I am by no means satisfied, that under
 the circumstances of this case, this sale ought to be set aside,
 either for the want of power in Charles Terrell to make it,
 or by reason of any fraudulent or improper conduct between
 the appellant and him, in relation to the purchase money,
 which ought to vacate it.

The bill denies that any power at all was given, but in-
 sists that if any was given, it was a limited power, inas-
 much as it directed a *sale for cash*. There is no allegation,
 as a ground for vacating the sale, that there was inadequacy
 of price, or any particular destination or appropriation of the
 purchase money, which the agent and purchaser combined
 to defeat ; but, that instead of a *sale for cash*, as directed,
 it was made to pay a debt due from Charles Terrell the
 agent, to the appellant, when he, Charles, was in his debt.

It is proved by Christopher Lynch, who saw the letter,
 that it did contain a power to sell for cash, and lay the mo-
 ney out in young negroes, and he thinks also, a perfect dis-
 cretion on the subject : that when the appellee returned to
 this State, he admitted he had written such a letter, and did
 not materially differ from the witness, as to its import and
 construction ; but by his construction, it would still have
 given Charles a discretion to sell.

The deponent was apprised by Charles of the appropri-
 ation he intended to make of the greater part of the pur-
 chase money, as hereafter mentioned, and says that from
 his knowledge of the brothers, together with the letter, he
 would have had no hesitation in making the purchase.
 He also proves that the lot was sold for a fair price ; but
 says, the appellee complained, that Charles was in his debt,
 and had not treated him well by selling the lot.

1823. The denial of *any authority*, then, was contrary to the
November. appellee's own knowledge of the fact; and, in candor and
Morris and truth, he ought to have rested his case solely on the charge,
others that it was not a sale for cash. But this charge is denied,
v. and as to the greater part of the purchase money, is dis-
Terrell. proved; and on an account being ordered, I presume, could
have been altogether disproved. How was it?

The appellee, before he went to Tennessee, sold a bill on Philadelphia, and received the cash. The drawee could not be found, nor could it be discovered that any such person had ever resided there; it of course came back protested. Upon this, Charles Terrell, to save the honor and credit of his brother, took in the bill, and gave his own bond, on which, at the time of the sale, a judgment had been obtained, and execution sued out. Now, though it since appears that Charles Terrell was at that time in debt to his brother, even after a credit for this sum; yet, he says, that accounts for many years, had existed between them, the state of which he knew not, and did not know he was in debt. He was not bound, therefore, to take this step for his brother; but having done so, and being now pressed by execution, instead of buying slaves for his brother, and suffering his own property to be sold, he made a sale of the lot for \$500, and applied \$418 67, to the discharge of this debt; and this, it is true, with the knowledge of the appellant at the time of the sale, of this destination of so much of the proceeds, who actually paid that debt. Suppose it had turned out that Charles had not been in debt to his brother; would not this have been a payment in cash, even to the appellee himself?

But in either way, it was, in reality, his debt. It is true, if Charles had known the state of the accounts, and had told the appellant that notwithstanding that, he intended to screen his own property, there would have been some appearance of combination between them, even if the appellant had paid over the money to him, and had alledged that it was not incumbent on him, to see to the appropri-

ation of it. But no such case is made out; and when we add to this, that the appellant never saw the letter, but took it for granted, from the representations of Christopher Lynch and Charles Terrell, that the latter had a power to sell for cash, no *intentional* fraud can be attributed to him, any more than if he had paid the cash to Charles, instead of the creditor, leaving it to him to use the money as he thought proper. Some interest or unworthy motive, of which I cannot see a semblance, ought to be shewn, to inculpate him, if that is necessary; as, under all the circumstances of this case, I think it is, in order to defeat the legal title in him, which has been thus honestly acquired and paid for. The after-disputes and settlement between the brothers, however the accounts may now stand, is not enough. Indeed, Charles cannot be accused of *intentional* wrong. I come to this conclusion, not only from the *bona fides*, in reality, of the transaction, but because I think the appellee is not altogether clear of blame. He was guilty of negligence in giving a power to his brother, in whom it was natural to suppose, from their previous confidence in each other, the world would confide, if he was unworthy of that confidence; and has thus contributed to any deception, if any has been practised by that brother, either on himself or others. This power, to say the least of it, was contained in a letter calculated to produce, and did produce, a belief that it justified this very sale, in the mind of the witness, and which, of course, was calculated to produce the same opinion in the mind of the appellant. Micajah Terrell had left the State without a previous settlement with his brother, leaving his own honor in jeopardy as to the bill sold, and also his brother's in some respect, who had told the purchaser that he might rely on its payment. I cannot help thinking, therefore, that if this letter had not been lost or mislaid, or if Lynchburg lots had been falling, instead of rising, in price, on his return, we never should have heard of the defect of this power.

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1823. But this was not a sale, as is alledged in the bill, to pay
November. a debt due from Charles to the appellant Morris. It was
Morris and a sale for cash, and \$418 67, was paid in cash, as above
others stated. As to the residue, there was a part of the original
v. purchase money due to Lynch ; concerning which, there
Terrell. is, and can be no dispute ; and the small balance remaining,
 was to go as a credit on a bond for a larger amount, in
 which the appellee went off indebted to the appellant.
 Perhaps Charles was security in that, or was desirous to
 save his brother's honor there also ; for, he promised to pay
 the balance, as soon as he got his crop to market, as is
 alledged in the answer, and all this would, doubtless, have
 been proved on taking the accounts. It was, therefore, a
 sale for cash, and cash payments, and consequently, the
 only complaint in the bill is done away. This case pre-
 sents another hardship, which induces me to think that less
 injustice will be done in affirming the sale, than in setting
 it aside.

About the time of the suit, whether before or after does
 not appear, the appellant sold a part of this lot, and a brick
 house has been built and other monies laid out, which have
 enhanced its value. The appellant, or some one else, per-
 haps equally innocent, must lose this, unless the appellee
 can be made to account for it. This I think would be too
 great a premium on his transactions in this case. I have
 not particularly investigated this point, nor is it necessary,
 the other Judges being of opinion, that no account of these
 improvements can be taken. Indeed, I am inclined to
 think, from the manner in which this point is presented by
 the record, that no account can be taken.

I therefore think we ought to reverse the decree and dis-
 miss the bill. The other Judges, however, are of a differ-
 ent opinion, and the only question remaining is, whether
 there can be a decree between the appellant and the repre-
 sentatives of Charles Terrell, for the money paid in dis-
 charge of the debt aforesaid, there being no dispute as to
 any other sum ? The amount thus paid, as stated in the

answer of the appellant, was £128 12s. The witness 1823.
McClelland says, as near as he recollects, it was £125 12s. *November.*
It seems to me that a decree may be made between those *Morris and*
parties. But, as those representatives have no counsel here, *others*
and as there is no one authorised to assent to a decree for *v.*
any specific sum, all that we can do is, to send the cause *Terrell*
back for an account between those parties, settling the prin-
ciple that it is competent for the Court to decree between
them.

The appellee has recovered his costs in the Court below
against the appellant, by the decree, and must have his costs
here on the affirmance.

As to the future costs in taking the accounts, &c., they
will of course be charged, either to the appellant or to the
representatives of Charles Terrell, as either shall require
the services producing such costs. But, on the final decree
between them, I think the estate of Charles Terrell ought
to be made responsible, not only for the interest of the mo-
ney paid, but all costs incurred by the appellant, as well
here as in the Court below, in the same manner as if he had
brought a suit to have his purchase money and costs reim-
bursed.

As to the bond of the appellee, if that was delivered up
to Charles Terrell, it ought to be returned or accounted for.

Judge BROOKE, concurred with Judge GREEN; and
this was, in substance, the decree entered up: That al-
though the decree of the Chancellor is right so far as it goes,
it is erroneous in not proceeding to decree that the defen-
dants, the personal representatives of Charles Terrell,
should, out of the assets of their testator, if so much there-
of they have, pay to the appellant what the said Charles
Terrell received from him, in consideration of the sale of
the lot in the proceedings mentioned, with interest from the
time of the receipt thereof, and all the costs expended by
the appellant in defending this suit; and to that end, pro-
per accounts should have been directed. In taking such
accounts, the said representatives should be also charged

1823. with all costs and loss, incurred by the appellant in the pro-
November. secution of this appeal ; and that the costs of the further
 prosecution of the said suit, which would otherwise be
 chargeable to the appellee, should be borne in the first in-
 stance by the appellant. Therefore it is decreed and order-
 ed, that the decree aforesaid, so far as the same conflicts
 with the foregoing opinion, be reversed and annulled, that
 the residue thereof be affirmed ; and also, that the appellant
 do pay to the appellee, as the party substantially prevailing,
 his costs by him about his defence in this behalf expended.
 But, this decree is to be without prejudice to any suit which
 the appellant may be advised to bring against the said
 Charles L. Terrell's representatives, claiming compensation
 for improvements on the said lot, or to any defence of the
 said Terrell's representatives, against such suit or claim.

FAIRFAX v. LEWIS.

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THE SAME v. THE SAME.

What constitutes an independent covenant.

A purchaser is not bound to prepare and tender a deed to the vendor, unless such an obligation can be inferred from the terms of the contract.

In a contract between A. B. and C. by which A. purchases from B. part of a tract of land, the title to which was in D. and B. covenanted to procure a conveyance for that part of the land to A. and C. purchases the residue of the land of B. and purchases also from A. that part which A. had purchased of B. for which A. covenants with C. to procure him a proper conveyance ; and, in the same contract, B. covenants with C. to procure him a conveyance of the whole tract ; upon the general plea of *covenants performed* by A. proof that B. procured a conveyance of the whole land to C. does not support the issue on the part of A.

These were two actions of covenant ; one brought in the Superior Court of Law for Jefferson county, by *Lewis v. Fairfax* ; the other brought in the Superior Court of Law for Loudoun county, by *Fairfax v. Lewis*.

The covenant on which both actions were founded, was in substance as follows :

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Fairfax
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On the 26th of April, 1804, *Philip Fitzhugh, Joseph Lewis, junior, and Ferdinando Fairfax*, entered into an agreement, under seal, by which the said *Fitzhugh* purchased of the said *Lewis* his estate called *Clifton*, in Loudoun county, with the mill, distillery, and every implement belonging thereto, &c., the quantity of land being about 203 acres, possession to be delivered on the first day of May following, with a good conveyance, by a clear deed, with general warranty, and free from every incumbrance, *except a mortgage for four thousand pounds, to Joseph Tidball, payable the first day of May, 1813, with interest, annually, from the first of May next ; which mortgage the said Fitzhugh assumed to discharge as a part of the purchase consideration ; and likewise to assign over to said Lewis an obligation or assumpsit of Richard Bland Lee, for \$ 5,000, and to pay the balance of \$ 8,333½, out of a tract of about 19,200 acres, upon Bacon Creek of Green River, Kentucky, which the said Fitzhugh held the obligation of Thomas Lang, to convey in due form, when required by the said Fitzhugh, and which land Fitzhugh warranted to be clear of all claim for taxes or public dues, rating the said land at \$ 2 per acre, on an average. Then Lewis bound himself to procure to Fairfax, or whom he might direct, a conveyance or assignment, in due and effective form, of a certain claim held by Adam Douglas, as administrator of Robert Turnbull, deceased, upon Dr. E. W. Bull, estimated at about \$ 8,000, together with a proper assignment of the mortgage on said Bull's land, by which the said claim is secured, with the benefit of the suit in Chancery then depending for the foreclosure of the same ; also to assign or procure to the said Fairfax the above mentioned claim of Fitzhugh on R. B. Lee, for \$ 5,000 ; and likewise to procure a proper conveyance of the said part of the said Green River land to amount to \$ 8,333½, at two*

1823. *dollars per acre as aforesaid, to the said Fairfax, from*
November. the said Thomas Lang; the whole (subject to correc-
Fairfax tions,) put at \$21,333½, for which the said Lewis agrees
v. to receive, and the said Fairfax to make payment as fol-
Lewis. lows: The balance now remaining unsold of the *Pied-*
mont tract in *Loudoun*, and to the southward of what was
before conveyed to said *Lewis*, estimated to be about
2,500 acres, but to be ascertained by surveys already made
thereof by William H. Harding, at \$8 per acre, say to
the amount of \$20,033, of which the said *Fairfax* is to
convey his reversionary interest, with general warranty;
also wood-land on the *Blue Ridge* or *Short Hill*, or leased
land in the Valley between, selected by said *Fairfax*, as
soon as conveniently can be done, at his selling prices (but
not exceeding ten dollars per acre,) to make up the ba-
lance, say \$1,300; and should the above agreement take
effect, the said *Fitzhugh* engages to procure from the
said *Thomas Lang* a conveyance of the whole of the said
Green River tract of land to the said *Fairfax*, according
to the said *Lang*'s obligation to convey the same, and to
receive in payment the following, viz: certain lands in
the counties of *Washington* and *Montgomery*, in *Vir-*
ginia, bought by the said *Fairfax*, of *Hugh Holmes*,
and to be conveyed by either of them to the said *Fitz-*
hugh, with special warranty, at the price of \$5,000;
certain lands in *Pennsylvania*, bought by said *Fairfax* of
Richard Bland Lee, whose conveyance to said *Fitzhugh*,
in due form, said *Fairfax* shall procure, the quantity per
surveys or patents now exhibited, for \$8,400; a tract of
land in *Wood* county, per patent, said to be 5,000 acres,
to be conveyed to said *Fitzhugh* by *Thomas Wilson* of
Morgantown, as he would have conveyed to said *Fairfax*,
at \$5,500; certain lands in *Bourbon* county, *Kentucky*,
conveyed by *Fendall* to said *Fairfax*, and by him to be
conveyed to said *Fitzhugh*, by a similar deed, for \$4,000;
the lot and houses in *Hillsborough*, purchased by said *Fair-*
fax from *Thomas D. Stevens*, for \$1,666 66; the lot

and houses in the same place purchased by the same from *Thomas Leslie*, for \$ 1,200, to be conveyed without delay, and immediate possession given, except a lease for the first for one year, the rent thereof to go to the said *Fairfax* : the lot of *Stephen Donaldson* on the *Arcadia* tract, subject to the life estate of Mrs. *Sarah Fairfax*, and the lease of said *Donaldson*, say 335 acres, at \$12, equal to \$ 4,020 ; any balance on either side to be made up in some way convenient and accommodating to the party having the same to pay. It was farther agreed between the parties, that this contract shall take immediate effect, and be binding upon each of them, their heirs, executors, and administrators, when the said *Fitzhugh* shall determine to take the *Clifton* estate, on the terms first above expressed, which he has the option of accepting or refusing, upon actual inspection, to be made by him, without delay.

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This agreement was signed and sealed by *Lewis* and *Fairfax* ; and the following writing was subjoined : “ After viewing the *Clifton* estate, I do hereby ratify the above contract this 3d day of May, 1804.

PHILIP FITZHUGH, (Seal.)”

An addition was made to this agreement, dated the 4th of May, 1804, by *Lewis* and *Fairfax*, under their hands and seals, by which it is stipulated, that for ascertaining finally the difference between the true quantity of land of the *Piedmont* tract, conveyed to the said *Lewis* by the said *Fairfax*, and the estimated quantity of 2,361½ acres, they will submit to a survey to be made without delay, by *William H. Harding*, at the instance and expense of the said *Lewis*, except as to the lots of *Joseph Thompson*, *William Hough*, and *Samuel Clendenning*, and the slip on *Taylor's* line, sold to *James McIlhaney*, which have not been already surveyed ; and that when ascertained, such difference (excess or deficiency) is to be accounted for at \$ 8 per acre : that *Fairfax* shall cause to be immediately con-

1823. veyed by the said *Harding* to the said *Lewis* the land which
November. *Harding* owns upon *Broad Run*, on the *Tankersville* tract
Fairfax (said to be about 158 acres,) by actual survey, at \$ 16 *per*
v. acre, payable first in the deficiency of the said *Piedmont*
Lewis. land, conveyed to *Lewis* as aforesaid, compared with the
property received of the said *Lewis*, according to the
within contract, when the decree of the Chancellor shall
fix the amount of *Turnbull's* claim on *Bull*, which is now
received by *Fairfax*, at not less than \$ 6,000, with inter-
est from the 1st of January, 1801, and the balance in
some property convenient and accommodating to both par-
ties.

In the action of *Lewis v. Fairfax*, the declaration as-
signs as a breach of covenant, that the said *Fairfax* "did
not immediately, or at any time since, cause to be conveyed
by *William H. Harding*, to the said *Lewis*, the land
which *Harding* then owned upon *Broad Run*, on the *Tan-*
kersville tract, (said to be 158 acres, by actual survey,) at
\$ 16 *per* acre, &c."

Fairfax pleaded *covenants performed*; and a special
plea to the following effect: that he has always been ready
to cause to be conveyed by the said *William H. Harding*
to the said —, the land which *Harding* owned on *Broad*
Run, said to be 150 acres by actual survey, if he had been
thereto required; but the plaintiff never did require or de-
mand a conveyance of the same, according to the tenor of
the said covenant; and he put himself upon the country.

To the first plea, the plaintiff replied generally, and is-
sue was joined; and to the second plea he put in a general
demurrer. Upon argument, the demurrer was sustained
by the Court, and the plea overruled.

At a subsequent term, the cause came to trial, and the
jury found a verdict for \$2,528 damages, with interest from
the 4th day of May, 1804, until paid. The Court gave
judgment accordingly.

Fairfax obtained a *supersedeas*.

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In the suit of *Fairfax v. Lewis*, (which is founded on the same agreement, as before mentioned) the declaration alleges, that *Fairfax* had well and truly performed all the covenants and agreements on his part to be performed, so far as they regard the said *Lewis*, and in particular, he avers that on the 4th day of May, 1804, he conveyed to the said *Lewis* by a good and sufficient deed, the *Piedmont* tract of land in the contract mentioned, which said tract contained 2,361½ acres, and which said conveyance was accepted by the said *Lewis*, under and by virtue of the agreement aforesaid; nevertheless, the said *Lewis* has altogether failed to perform the said agreement, so far as it regarded the said *Fairfax*, and has broken the same in these instances, viz: the said *Lewis* has failed to assign to the said *Fairfax*, the claim held by *Adam Douglas*, as administrator of *Robert Turnbull*, deceased, upon *W. Bull*, estimated at \$ 8,000, and altogether failed to establish the said claim to amount to \$ 8,000, or even \$ 7,200, but that the said claim only amounted to \$ 7,192: that the said *Lewis* has altogether failed to assign or procure to the said *Fairfax* the claim of *Philip Fitzhugh* on *Richard B. Lee* for \$ 5,000: that the said *Lewis* has altogether failed to procure a proper conveyance of the said part of the said *Green River* land, to the amount of \$ 8,333 33 cts. at two dollars per acre as aforesaid, to the said *Fairfax* from the said *Thomas Lang*; and that the said *Thomas Lang* had not, at the time of the execution of the agreement aforesaid, or ever after, a good, sure, perfect and indefeasible estate in fee, in and to the said *Green River* tract of land, whereby he could convey, by a proper conveyance, to the said *Fairfax*, the aforesaid part of the said tract, amounting at \$ 2 per acre to \$ 8,333 33 cts.

The defendant pleaded *covenants performed*; whereupon issue was joined.

At the trial the plaintiff filed a demurrer to the evidence of the defendant, to support on his part the issue joined, which the defendant refused to join; but the Court directed

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him to join in the said demurrer, on the plaintiff's consenting that the same should be subject to the following terms ;
 " The demurrer in this case is also to be subject to the opinion of the Court on this point, to wit, whether as the pleadings and issue in this cause are, it was incumbent upon the plaintiff to prove a performance, or an offer on his part to perform the following covenants contained in the deed set forth in the declaration, to wit ; the covenant for the conveyance of *Woodland* on the *Blue Ridge*, or *Short Hill*, or leased land in the Valley, and the covenant for the conveyance of the lot of *Stephen Donaldson* on the *Arcadia* tract, and the covenants for the conveyance of the land owned by *William Harding* upon *Broad Run* in the *Franklin* tract, of the performance of which covenants, or of any offer or tender to perform them, no evidence was offered to the jury." To these terms the plaintiff assented, and the defendant thereupon joined in the demurrer. Whereupon a juror was withdrawn, and the rest of the jury discharged from rendering a verdict.

On the trial, five bills of exception were filed.

1. The plaintiff offered in evidence, a certificate purporting to be the certificate of the Register of the Land Office of the State of Kentucky, under the seal of the said Office, certifying, that 19,000 acres of land entered with the Auditor for taxation, in the name of *Thomas Lang, jun.* was lying in *Harding* county and as patented to *William Pollard*, was exposed to sale in the following manner (" as appears from the books of the sale of non-residents land in my office,") viz. 4,000 acres to W. J. Adair in the year 1804, for the taxes and costs due thereon for the year 1803, &c. signed *Mark Harding, R. L. Off.* and sealed with his official seal.

There was also a certificate purporting to be that of the Governor of Kentucky, under the seal of the said State, certifying that the said *Mark Harding* is and was, at the time of signing the foregoing certificate, Register of the Land Office of Kentucky, and that full faith and credit should

be given to all his official acts. Signed *Charles Scott*, and countersigned by *J. Bledsoe*, Secretary.

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The defendant objected to the said evidence, stating, that the same was not authenticated according to the act of Congress ; and the Court sustained the objection, and refused to suffer the said certificates to be read. To this opinion the plaintiff excepted.

2. The plaintiff offered in evidence a certificate purporting to be a certificate of the Auditor of the State of Kentucky, stating, that on the 12th day of August, 1797, *John Philips* listed for taxation in that office the following tracts of land, viz : 19,000 acres, third rate, lying in the county of *Harding* on *Green River*, and patented in the name of *W. Pollard*, on the 25th day of November, 1803. The above tract of land was transferred from *John Philips* to *Thomas Lang, jr. &c.* signed *George Madison*; and a certificate of the Governor, in official form, that *George Madison* is Auditor of public accounts for the said State.

The plaintiff, at the same time, offered in evidence a paper purporting to be a copy of "an act providing for the redemption of lands sold for taxes," in these words, &c. certified by *J. Bledsoe*, Secretary of State, to be a true and perfect copy of the original enrolled bill.

The defendant objected to the reading the said papers, stating, that they were not duly authenticated according to the act of Congress ; and the Court sustained the objection. To that opinion, the plaintiff excepted.

3. The plaintiff offered to prove, by parol evidence, that the tract of 19,200 acres on *Green River* in Kentucky, mentioned in the contract aforesaid, was not then worth, nor is it now worth, the taxes payable on the said land ; but the defendant objected to such testimony, and the Court sustained the objection. The plaintiff excepted.

4. The plaintiff offered evidence to prove, that the property in the aforesaid contract mentioned, called *Clifton*, conveyed as aforesaid by the defendant to the said *Philip Fitzhugh*, was not at that time intrinsically worth \$ 8,000 ;

1823. and that the tract of land called *Piedmont*, conveyed as
November. before-mentioned by the plaintiff to the defendant, was
Fairfax of greater value than the price at which the same was
v. rated. But, the defendant objecting to this evidence, the
Lewis. Court refused to admit it. To this opinion, the plaintiff
excepted.

5. The plaintiff offered in evidence a copy of a contract between *Ezekiel W. Bull* and *Philip Fitzhugh*, dated the 4th of May, 1804, with two endorsements thereon, the last of which is in the hand-writing of the said *Bull*. The contract stipulates, that, in consideration of a claim held by the said *Bull* against *Theodorick Lee*, to the amount of \$11,000, the said *Fitzhugh* agrees to have conveyed to the said *Bull*, the two following pieces of property, viz: two certain tracts of land lying in *Bourbon* county, Kentucky, and several tracts of land in the county of *Lycoming* and *Mifflin*, Pennsylvania; all which property the said *Fitzhugh* is to receive from *Fairfax*; but, as the valuation of the said property exceeds the claim of the said *Bull*, in the sum of \$1,420, the said *Bull* agrees to account with the said *Fitzhugh* for the same, within the term of three months from the time the title papers are passed to him, if he should not, before that time, sink the claim of any balance, by an order on said *Fitzhugh*, from General Henry Lee.

The endorsement states, that the contract is subject only to the condition of *Fairfax* receiving from *Thomas Lang*, either mediately through *Fitzhugh*, or directly from himself, a conveyance of certain lands on *Green River* free from every incumbrance, agreeable to the contract entered into between *Fairfax* and *Fitzhugh*, on the 26th of April last. Signed by *Fitzhugh* and *Bull*.

There is also an endorsement signed by *Bull*, stating that the first endorsement is in the hand-writing of *Fairfax*, and by his suggestion annexed to the said agreement.

The said copy of the agreement and endorsements, was offered for the purpose of impeaching the truth of the said *Bull's* deposition; and the defendant having objected

thereto, the Court permitted the said testimony to go to the jury for the purpose aforesaid, but informed the plaintiff's counsel, that if he persisted in using it, the Court would not compel the defendant to join in demurrer; the Court being of opinion, that the demurrant, in such a case as this, could not be permitted to impeach the truth of the evidence demurred to; whereupon the plaintiff's counsel withdrew the said copy and endorsement, and excepted to the opinion of the Court.

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The demurrer to evidence was, in substance, as follows : To maintain the issue on the part of the defendant, he gave in evidence to the jury the contract entered into, between the plaintiff and defendant and *Philip Fitzhugh*, with the endorsements thereon, and additions thereto, dated the 26th of April, 1804, as above recited :

A deed from the defendant to *Philip Fitzhugh*, for the property called *Clifton*, dated the 4th day of May, 1804 :

A letter from *Fairfax* to *Lewis*, dated the 9th of February, 1805, informing him that Dr. *Bull* intended to attempt to get rid of his debt to *Robert Turnbull*, (assigned to *Fairfax* by *Lewis*,) by shewing usury in the transaction :

A deed of mortgage from *Bull* to *Turnbull*, dated the 21st of April, 1801, to secure a debt of \$6,000.

A decree of the Staunton Chancery Court, foreclosing the said mortgage :

The defendant then proved by a witness, that the plaintiff received the proceeds of the sale of the mortgaged property aforesaid, made under the decree aforesaid; and that the assumpsit of *Richard B. Lee*, mentioned in the contract before mentioned, was assigned to the plaintiff, according to the terms of the said contract.

A copy of a receipt given to *Fairfax*, 21st of June, 1804, by *Fitzhugh*, acknowledging his having received from the said *Fairfax*, his obligation to convey, when required, his reversionary right of *Donaldson's* lot in *Arcadia*; also his orders on *Stevens* and *Leslie*, for a conveyance of their lots and houses in *Hillsborough*, &c.

1823. The deposition of *Bull*, stating his impressions of the
November. understanding of the parties in the contract of the 26th of
 April, 1804 :

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The evidence of *Thomas Lee*, to prove that a deed was executed by *Thomas Lang* to the plaintiff for the 19,200 acres of land, mentioned in the said contract ; which deed was put into the possession of the said *Lee*, as the agent of the said plaintiff, and was enclosed by him, the said *Lee*, in a letter to the plaintiff, which letter was produced by the plaintiff ; suggesting an imperfection in the deed, in taking Mrs. *Lang's* relinquishment of dower, and advising the proper course to have the error corrected, &c.

The plaintiff gave in evidence on his part, the conveyance of himself, to the defendant, of the *Piedmont* land, dated the 4th day of May, 1804 :

A letter from *Fitzhugh* to *Lang*, dated 21st of June, 1804, informing him that as *Fairfax* deemed the deed to him (*Fitzhugh*) insufficient, he requested that *Lang* would execute another deed to *Fairfax*, referring to the bounds of the original patent, with Mrs. *Lang's* relinquishment taken in proper form, as the laws of Kentucky require, &c. ; and he further proved that *Lang* received the said letter through the agent of the plaintiff.

The plaintiff proved that he sent an agent to the house of the said *Lang*, with instructions to procure a deed for the *Kentucky* land, and to view the said land and make enquiries about its boundaries, natural advantages, soil, value, title, &c. : that *Lang* objected to give such deed as the plaintiff requested : that *Lang* gave the agent no receipt for the payment of taxes of the said land.

Upon this demurrer to evidence, the Superior Court gave judgment for the defendant.

Fairfax obtained a *supersedeas*.

Nicholas, for the appellant.

Wickham, for the appellee.

November 22. Judge GREEN. The contract upon which these actions were founded, was entered into on the 26th day of April, 1804, between *Joseph Lewis, Ferdinando Fairfax* and *Philip Fitzhugh*; by which it was stipulated between Lewis and Fitzhugh, that Lewis sold to Fitzhugh his Clifton estate, subject to a mortgage for £ 4,000, for which Fitzhugh was to pay by assigning to Lewis an obligation of Richard B. Lee for \$ 5,000, and the balance of \$8,333 33 cts. out of a tract of 19,200 acres of Kentucky land ; for the conveyance of which in due form when required, Fitzhugh held the obligation of Thomas Lang, and which land Fitzhugh thereby warranted to be clear of all taxes and public dues ; the land to be rated at two dollars *per* acre. Then Lewis stipulated to procure an assignment to Fairfax or to whom he might direct, of a mortgage from Bull to Turnbull, estimated at about \$ 8,000, and to assign or procure to said Fairfax the said obligation of Richard B. Lee for \$ 5,000 ; and likewise to procure a proper conveyance of the said part of said Green River land, to the amount of \$ 8,333 33 cts. at two dollars *per* acre, to said Fairfax from said Lang: the whole property so to be transferred to Fairfax by Lewis, put at \$21,333 33 cts. subject to correction. For which Lewis agreed to receive, and the said Fairfax to make payment as follows :—by conveying to Lewis, with general warranty, his reversionary interest in the *Piedmont* tract of land, estimated to be about 2,500 acres, but to be ascertained by surveys already made by Harding at \$ 8 *per* acre, say to the amount of \$ 20,033 33 cts. and the balance, say \$ 1,300, in other lands on the Blue Ridge or Short Hills, or in the Valley between, at his usual selling prices, not exceeding \$ 10 *per* acre, as soon as conveniently could be done ; and if the said agreement should take effect, Fitzhugh engaged to procure from Lang to Fairfax, a conveyance of the whole of the said Kentucky land, according to Lang's obligation to convey the same, and to receive in payment certain property specified in the agreement. This agreement was to be bind-

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1823. ing on the parties, whenever Fitzhugh should determine to
November. take Clifton, which he had an option to take or refuse, after
 {
Fairfax he should inspect it, without delay. On the 3d of May,
v. 1824, Fitzhugh, by endorsement on the agreement, recti-
Lewis. fied it; and on the next day, (the 4th of May, 1804,) Lewis
 and Fairfax entered into a supplemental contract, endorsed
 on the original agreement, to the following effect: that, for
 the purpose of ascertaining finally the quantity of the *Pied-*
mont tract of land that day conveyed to Lewis by Fair-
 fax for the estimated quantity of 2,361½ acres, an immedi-
 ate survey should be made, and that when ascertained, the
 deficiency or excess of the real quantity, compared with
 the estimated quantity, should be accounted for at \$ 8 *per*
 acre : that Fairfax should cause to be immediately convey-
 ed to Lewis by Harding a tract of land belonging to Har-
 ding, (said to contain 158 acres) by actual survey, at \$ 16
per acre; to be paid for by Lewis, first in the deficiency of
 the *Piedmont* tract of land, according to the within con-
 tract, when the amount of Bull's mortgage, which was then
 received at not less than \$6,000 with interest from January,
 1st, 1801, was fixed by the decree of the Chancellor, (it
 appears by the contract, that a bill to foreclose the mort-
 gage was then depending,) and the balance in some property
 convenient to the parties. Upon these contracts Lewis and
 Fairfax mutually instituted actions, each against the other.
 In that of *Lewis v. Fairfax*, the only breach assigned
 was, that Fairfax had failed to procure Harding to convey
 to Lewis the 158 acres of land mentioned in the supple-
 mental contract.

The defendant pleaded "covenants performed," and
 that he had always been ready to procure the conveyance
 from Harding to Lewis, but that the plaintiff had never
 demanded it. Upon the first plea, the plaintiff took issue,
 and demurred generally to the second. The issue was
 found for the plaintiff; the demurrer sustained, and judg-
 ment given on the verdict, for the plaintiff.

The appellant objects, that the covenant alledged by Lewis to be broken by him, was dependant upon the performance by Lewis of his covenants, contained in the original agreement, and that the performance of those covenants should have been averred; that the deficiency, appearing upon an actual survey in the quantity of the *Piedmont* land, should also have been averred; and that the plaintiff should have averred, that he prepared and tendered a deed for, and demanded a conveyance of Harding's land; and that without such averments in the declaration, the plaintiff's action could not be maintained.

The property stipulated to be transferred by Lewis to Fairfax, was estimated at \$ 21,333 33 cts. subject to correction. There was no uncertainty as to the value of any part of this property, except as to Bull's mortgage, which depended upon the event of the suit for foreclosure, then depending. The quantity of the *Piedmont* land, which Lewis was to take in payment, at \$ 8 per acre, was also uncertain. It was estimated at about 2,500 acres. But it was by the original contract, to be ascertained by surveys already made, but not in the possession of the parties. I think the legal effect of the original contract was, that when the quantity and value of these subjects respectively, then uncertain, should be ascertained, Fairfax was to make good the amount of Lee's bond, the Kentucky land and Bull's mortgage, as it might turn out to be more or less, in other lands on the Blue Ridge or Short Hills, or in the Valley between them. It appears from the supplemental contract, that the *Piedmont* land was then ascertained, probably in the mode prescribed by the original contract, to contain only 2,361 $\frac{1}{4}$ acres, falling short of the estimated quantity by 138 $\frac{1}{4}$ acres; and Harding's land seems to have been substituted for the land originally in contemplation of the parties, on the Blue Ridge or Short Hills, or in the Valley between them. And it was then agreed, that a survey of the *Piedmont* land should be made, with a view to ascertain its actual deficiency; and when the amount of Bull's mortgage

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Done

1823. should be ascertained by a decree, and the survey made,
November. the value of the property according to the stipulated prices
 Fairfax in the agreement, received of Lewis according to the ori-
v. ginal agreement, should be compared with the real value of
 Lewis. the *Piedmont* and Harding's land, at the stipulated prices,
 and the difference paid in *some property* convenient to the
 parties. This was obviously the intent of the parties, de-
 duced from the terms of the contracts ; and if so, the stipu-
 lation in relation to the conveyance of Harding's land, was
 an independent covenant. Harding's land was to be con-
 veyed *immediately*. The expected decree could not be
 rendered for some time, and no matter what was the amount
 of the decree, or the quantity of land ascertained by the
 survey, Fairfax was bound to procure the conveyance of
 the land. If the land had turned out to be 3,000 acres, and
 the mortgage nothing, still Fairfax was bound to procure
 the conveyance, and seek a compensation, under the provi-
 sion that the difference should be paid in property conve-
 nient to the parties. He could not compensate himself by
 withholding the property which he had stipulated to procure
 a conveyance for *immediately*. For the same reasons, a
 survey of the *Piedmont* lands was not a *precedent* condi-
 tion. That was to be made only for the purpose of ascer-
 taining what difference was to be paid in property by Lewis
 after he had received a conveyance of Harding's land, and
 the amount of Bull's mortgage was ascertained.

It is true that the performance of Lewis's stipulations
 with Fairfax, by the terms of the original agreement, was
 a condition precedent to the performance of Fairfax's stipu-
 lations with Lewis, in the same agreement. Fairfax stipu-
 lates to pay for the property to be transferred to him by
 Lewis in the manner specified ; and until the property was
 transferred, he was not bound to pay for it by the contract.
 But although, by the supplemental agreement, Harding's
 land was substituted for the land on the Blue Ridge or Short
 Hills, or the Valley between, yet it was substituted with this
 difference; that by the original contract, Fairfax was not

bound to convey the lands which he stipulated to convey to Lewis, until the latter had performed his covenants ; by the supplemental contract, he was bound to procure a conveyance of Harding's land, immediately and unconditionally, without regard to the performance by Lewis of his covenants. There is a general averment in the declaration, that Lewis had performed all his covenants contained in the original and supplemental agreements. As no averment of performance on his part was necessary, there is no occasion to enquire here, whether this general averment would be sufficient as to the conveyance of the Kentucky land, if any averment as to that were necessary.

If it be true, that a party who covenants to convey or procure a conveyance of land, without any limitation of time, has his life-time to perform his covenant, unless hastened by request ; that doctrine does not apply to this case, in which the covenant is to procure the conveyance *immediately*. This expression limits the time to the shortest possible period within which the conveyance could be conveniently procured, and has the same effect, as if the covenant had been to procure the conveyance upon request, and the request had been made immediately upon the execution of the covenant. The demurrer was, therefore, properly sustained. Nor do I think that it was necessary to aver in the declaration, that a deed was prepared and tendered by the plaintiff. Upon the principles of the common law, any one undertaking to do an act or cause it to be done, is bound to do it or cause it to be done at his peril, and to find the means of doing it, unless it cannot possibly be done, without the active concurrence of the party with whom the contract is made. In England it seems to be doubtful, whether, in case of a contract to convey, it is not necessary that the purchaser should prepare the conveyance and tender it for execution, whether the contract provides that it shall be made at his expense or not. But if it be necessary, it is an exception to the general rule of law, and founded upon the practice of the profession in

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1823. that Country as to Conveyancing. No such practice pre-
November. vails here, and there is no reason with us, why the general
 Fairfax rule of law aforesaid should not prevail. I think there-
 v. fore, that the judgment in the action brought by Lewis v.
 Lewis. Fairfax, ought to be affirmed.

In the action of *Fairfax v. Lewis*, the declaration avers, in general terms, that the plaintiff had performed all the covenants on his part to be performed, as far as they regarded the defendant, and particularly, that he had conveyed the *Piedmont* lands, and assigns for breaches of the covenants, by the defendant; 1, that he had altogether failed to assign Bull's mortgage, and altogether failed to establish the said claim to amount to \$8,000, or even \$7,200, and that in fact it amounted only to \$7,192; 2, that he had failed to assign Lee's bond; and, 3, that he had failed to procure a proper conveyance of the said part of the Kentucky land, to the value of \$8,333 33 cents, at \$2 *per* acre; and that Lang had not, at the time of the execution of the agreement, or ever after, a good, sure, perfect, and indefeasible title in fee to the land, whereby he could convey to the plaintiff, the said part of said land. To this declaration the defendant pleaded, that he had well and truly done and performed, on his part, all and each of the covenants in the said covenant contained, which, according to the true intent and meaning thereof, he was bound to perform. To which the plaintiff replied generally; and upon the trial of the issue, the plaintiff demurred to the evidence, and one of the jurors was withdrawn, with the assent of the parties. The defendant objected to join in the demurrer, but upon the condition, that the demurrer should be subject also to the opinion of the Court, whether, upon the pleadings and issue, the plaintiff was bound to prove a performance of, or an offer to perform, on his part, the covenants for the conveyance of Woodland, on the Blue Ridge, or Short Hills, or leased land in the Valley; and for the conveyance of the lot of Stephen Donaldson, and for the conveyance of Harding's

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land ; as to all which the plaintiff offered no evidence. It appears from the evidence demurred to, that Lewis had procured the assignment of Bull's mortgage : that the mortgaged property had been sold under a decree of foreclosure ; and that Fairfax had received the proceeds of the sale ; and that Lewis had assigned to Fairfax Lee's bond. It moreover appears, that on the 21st of June, 1804, Fitzhugh had executed a receipt to Fairfax, in which it was stated, that the former had given an order to the latter on Lang, to convey the Kentucky land. That order is given in evidence, and is in the shape of a letter from Fitzhugh to Lang, dated on the same day with the receipt, informing Lang that his deed to Fitzhugh, for the Kentucky land, was deemed by Fairfax (to whom he had sold the land,) insufficient, and requesting him to deed to Fairfax, the property, referring to the bounds of the original patent, by a deed to which Mrs. Lang shall be a party, and her examination taken and certified, as the laws of Kentucky require ; the deed to contain a covenant for further assurance ; and that the land is free from all incumbrances whatsoever, and a special warranty of 19,200 acres, within the bounds of the original patent. In consequence of this order, Lang and wife executed a deed to Fairfax, for the Kentucky land, the particular terms of which do not appear. But, it appears, that it was not a deed with general warranty. Mrs. Lang's privy examination was taken under a commission from the Clerk's office of the Court of Botetourt county, in Virginia, where Lang resided. This deed was delivered to the agent of Fairfax, who enclosed it to Fairfax, in a letter which Fairfax received. He informed his agent, that he was dissatisfied with the deed, as it was not such as his contract entitled him to. But, it does not appear that he ever returned the deed to Lang, or gave notice of his dissatisfaction with it to Lang, Lewis, or Fitzhugh. Upon this demurrer, the Court gave judgment for the defendant, and the plaintiff appealed.

1823. The view already taken of the contract, shews, that the
November. performance by Lewis of the covenant on his part, in the
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 Fairfax original agreement, was a condition precedent to the per-  
 v. formance of Fairfax's covenants in the same agreement ;  
 Lewis. and that the conveyance by Fairfax of Harding's land, sti-  
 pulated for in the supplemental agreement, was wholly in-  
 dependent of all other covenants in the contract, on both  
 sides. It was therefore unnecessary for the plaintiff to  
 aver or prove the performance of any covenant on his  
 part. But, if it were otherwise, the plaintiff having aver-  
 red and proved the performance of the most important sti-  
 pulation on his part, and the defendant having accepted  
 the conveyance of the *Piedmont* lands, the latter could  
 not resist the execution of the covenants on his part, be-  
 cause Fairfax had failed, in part, in the performance of his.  
 Otherwise, he would have held the property conveyed to  
 him, without responsibility to pay for it in any way. The  
 failure of one party to perform his covenants, can in no  
 case excuse the other party from performing his, unless  
 such failure goes to the whole consideration.

There can be no question, that Lewis had performed all  
 his covenants alledged to be broken, except as to the con-  
 veyance of the Kentucky lands. He had assigned Lee's  
 debt and Bull's mortgage. There was no warranty of  
 the amount of Bull's debt ; but if there was, it appears  
 from the decree, that, on the day of the contract, it was  
 equal to the estimated value, viz : \$8,000. The only  
 real question, therefore, in the cause, is as to the Kentucky  
 land.

By the terms of the covenant, Lewis was bound to pro-  
 cure a proper conveyance of Kentucky land (part of a  
 specified tract,) from Lang to Fairfax, to the value of \$8,33  
 33 cents, at \$2 per acre. This was, substantially, a cove-  
 nant to procure a good title ; for, if Lang had no title, his  
 deed could pass nothing, and could not, therefore, be called  
 a *conveyance*. And, in like manner, if his title was in  
 any degree imperfect or incumbered, his conveyance would

be, to that degree, imperfect and unavailing to the grantee. Did the covenant on the part of Fitzhugh to procure a conveyance of the *whole*, merge or destroy the engagement of Lewis, to procure a conveyance of a part? I think not. We are bound so to construe every contract, that every word shall, if possible, have its effect. If the parties had intended that Fitzhugh's engagement should annihilate that of Lewis, they would have said so expressly, or have omitted Lewis's covenant altogether. They must have intended, that Lewis's covenant should bind him in some way, and we are bound to construe it accordingly, unless there were such a total incompatibility between the covenants of Fitzhugh and Lewis, as that the one must, of necessity, destroy the other. I see no such incompatibility between the two covenants. I see no absurdity, in one man's being bound for all, and another for part. If it had been found that Fairfax could not perform his contract with Fitzhugh, they might well have vacated their contract, and left that between Lewis and Fairfax in full force. Fairfax paid Lewis for a part, and Fitzhugh for the residue, of the land. Fitzhugh was, therefore, bound for part to Lewis, and for the residue to Fairfax; and Lewis was bound to Fairfax for the same part. There was no reason then, that Fitzhugh should not engage to procure a conveyance for all to Fairfax, partly on his account, and partly on account of Lewis. But, Fairfax might well desire to hold Lewis bound, notwithstanding Fitzhugh's engagement, and the parties have modelled their contract accordingly.

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If Fitzhugh had procured a conveyance according to his contract, it would have discharged Lewis from all responsibility. But, would such act of Fitzhugh have discharged Lewis, because it excused Lewis from the performance of his covenant, by making it impossible for him to procure a conveyance of a part, in consequence of Lang's having already conveyed a complete title to the whole, or because such an act by Fitzhugh would have been a strict

1823. performance of Lewis's covenant, by himself, or by his  
 November. procurement? It seems that the case turns upon this  
 point. Lewis pleads that he has performed all the cove-  
 Fairfax nants, which, according to the true meaning of the con-  
 v. tract, he was bound to perform. Perhaps he ought to  
 Lewis. have stated, in his plea, how he had performed. This,  
 however, does not enter into the enquiry, whether the  
 evidence supports the issue. The plaintiff having taken  
 issue on the plea, cannot object to any evidence which  
 substantially supports the plea, because the plea is defec-  
 tive. If it really be so defective as not to be a bar to the  
 plaintiff's demand, he should have demurred to it, or, af-  
 ter the issue was found for the defendant, have moved for  
 a replader. This plea can only be supported by evidence  
 which shews, that Lewis had performed his covenant, and  
 not by evidence shewing that his non-performance was  
 excused by the act of the plaintiff, or any other; or  
 otherwise, the plaintiff would be surprised upon the trial.

I think that the evidence on the part of Lewis, that  
 Fitzhugh had procured from Lang a proper conveyance for  
 the whole of the land to Fairfax, was proof that Lewis  
 had, in strictness, performed his covenant. His stipula-  
 tion was not to convey, but to procure a conveyance, for  
 a part of the land. Lewis, by means of his contract with  
 Fitzhugh, procured him to undertake to procure, a con-  
 veyance from Lang. Without this procurement on the  
 part of Lewis, Fitzhugh would not have undertaken to  
 procure Lang's conveyance to Fairfax, for that part of the  
 land which he had sold to Lewis. The latter then procu-  
 red Fitzhugh, to procure from Lang the conveyance to  
 Fairfax, of so much of the land as Fitzhugh had sold to  
 Lewis, and he to Fairfax, and *qui facit per alium facit  
 per se*. To that extent, Fitzhugh acted for and on behalf  
 of Lewis; and although in doing so he was discharging  
 his obligation to Lewis, he was acting as between Lewis  
 and Fairfax as Lewis's agent. When Fitzhugh undertook  
 to procure a conveyance of the whole, he undertook on

behalf of Lewis for that part, for which Lewis had received a consideration from Fairfax, and for himself as to the residue. If the contract between Fitzhugh and Lewis, and the latter and Fairfax, and between Fairfax and Fitzhugh, had been distinct, and Lewis had assigned the obligation of Fitzhugh for procuring a conveyance of a part of the land to Lewis, to Fairfax, and Fitzhugh had then contracted to procure a conveyance of the whole to Fairfax, and had done so; I should say, without hesitation, that Lewis had performed his covenant, and procured a conveyance of the stipulated portion of the land. He would have procured the conveyance through Fitzhugh, as his agent, or in performance of Fitzhugh's obligation, it is immaterial which; as it would, in either case, be done by his procurement. This is the substantial effect; and I think, the just and literal construction of the contract. I cannot think that the three contracts, being made jointly, can receive a different construction from that which they would have received, if made severally.

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The proof in the cause is, that Lang did deliver a deed for the 19,200 acres, to the agent of Fairfax: that this was forwarded to Fairfax, and received by him, and it does not appear that he has ever parted with it. It does not appear, that he ever informed any of the parties interested in the subject, that he was even dissatisfied with it. These facts amount to clear proof that he accepted it; and if not, a jury might have inferred that fact from those circumstances, and the plaintiff being the demurrant, it ought to be presumed. The circumstance of his stating to his agent, not that he rejected the deed, but that he was dissatisfied with it, is entitled to no consideration. Whatsoever title Lang had, is vested in him, and lost to the other parties; and his acceptance of the deed is *prima facie* evidence, that the deed was a proper one and passed a good title. The only evidence, after this acceptance of the deed, competent to prove that the defendant had broken his covenant, was, that nothing passed by the deed; as to which, the *onus*

1823. *probandi* lay upon him, and he was not precluded from  
 November. exhibiting such evidence, by the want of a specification in  
 the plea, of the manner in which the defendant insisted he  
 Fairfax had performed his covenant ; since there was an averment  
 v. Lewis. in the declaration, that Lang had no title, and if there had  
 not been such an averment, such evidence was competent to  
 repel the defence set up by the defendant. Upon the ques-  
 tion of title, the plaintiff has exhibited no proof. It is  
 however objected, that the deed had no covenant of general  
 warranty by Lang. The deed was not the less effectual  
 on that account for passing a perfect title, and if it did pass  
 such a title, the covenant was performed ; especially as  
 Fairfax accepted an order upon Lang for the deed, which  
 specified minutely the covenants which were required of  
 him, and of which a general warranty was not one. It is  
 said also, that the dower of Mrs. Lang was not relinquish-  
 ed. But that does not appear. What was done, or even a  
 privy examination by magistrates without any commission,  
 may, for aught that can be judicially known to this Court,  
 have bound the dower rights of Mrs. Lang ; and I have al-  
 ready said, that the acceptance of the deed by Fairfax,  
 was an admission that it was in all respects proper, until  
 the contrary appears ; and that the *onus probandi* rests upon  
 him. He has the deed and does not produce it. The in-  
 ference which a jury might make, in the absence of all evi-  
 dence to the contrary, and which therefore the Court is  
 bound to make, is, that the deed was a proper conveyance  
 in form and in effect. If the title or the conveyance had  
 been objectionable, he should have rejected the deed, re-  
 turned it to Lang, and given notice to the parties concern-  
 ed. The consequence of his silence is, that the parties  
 have been lulled into security by his conduct, until by the  
 death of Lang, they are disabled from performing their co-  
 venants. A conveyance from Lang's heirs would not be a  
 performance ; and Fairfax would not be bound to accept it,  
 since it might not be so beneficial to him, as a conveyance  
 from Lang. Their covenants might not be as valuable as

his, and the land might have descended to them, charged with the payment of the specialty debts of their ancestor.

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Lewis.

I have not examined the question discussed at the bar, as to the supposed defect in the declaration, founded upon the idea that Lewis was not bound to procure the conveyance, until hastened by request ; a question not now proper for this Court. Those errors, if they exist, might be cured by a verdict, if the issue on the part of the plaintiff was supported ; and at all events, could only be urged upon a motion in arrest of judgment. If the evidence does support the issue on the part of the defendant, then there was no impediment to the final judgment pronounced by the Court below, in favor of the defendant ; unless the issue was immaterial ; in which case, a repleader ought to have been awarded. An issue is immaterial, when it is joined upon a point "which does not determine the right of the parties ; so that the Court cannot know, for whom to give judgment, whether for the plaintiff or defendant." In this case it is found, that the defendant did perform all the covenants which he was bound to perform. The plaintiff might, by demurrer, have compelled him to shew how he had performed them ; but having taken issue upon this general plea, and that being found against him, it is a complete bar : For, no matter *how* he performed his covenants, if it appear that he *has* performed them. That determines the right in favor of the defendant, and there can be no uncertainty as to the proper judgment.

The evidence set out in the bills of exception, was properly rejected by the Court. The papers mentioned in the first and second exceptions, were the certificates of public officers, of facts appearing, as they say, upon the records of their offices. If those officers had been in Court, and testified on oath to the same facts which they certify, such evidence would have been inadmissible. The plaintiff should have produced duly authenticated and literal copies of the entries upon the records, which they refer to. This would have been better evidence than the statement of any one,

1823. as to the effect of those entries. This case presents a striking proof of the necessity of adhering to the fundamental rule, that the best evidence which the nature of the case will admit of, shall be produced. These two officers, professing to certify as to the same facts, differ in their statements, in circumstances which, in this case, are perhaps immaterial, yet in other cases might be material. The rejection of the evidence mentioned in the two first exceptions, rendered that mentioned in the third, wholly irrelevant. The evidence mentioned in the fourth and fifth exceptions was so clearly irrelevant, as make it unnecessary to discuss the propriety of rejecting it. As to the sixth exception, the plaintiff cannot complain, as he himself withdrew the evidence, upon an intimation from the Court which was entirely proper.

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I think the judgment should be affirmed.

Judge COALTER. These were two cases argued together; I shall first consider the appeal from the judgment in the suit of *Lewis v. Fairfax*.

Several objections have been taken to the declaration; but I think it would be improper for this Court to consider them, even should we decide that the issue on the part of the appellee is not supported by the evidence. The authority cited at the bar, *Cort v. Birkbeck*, 1 Doug. 218, 225, is conclusive on this point, and is in strict coincidence with the provisions of the act of Assembly constituting this Court. If we reverse, we must enter such judgment as the Court below ought to have entered; which would have been, to declare the law for the appellant, and award a writ of enquiry.

It would not be proper, on a demurrer to evidence, to adjudge the law for the appellant, and then, no verdict being found, as in this case, to adjudge the law for the appellee on the declaration; because, there being no demurrer in law, a fatal defect in the declaration can only be taken advantage of, by a motion in arrest of judgment, after ver-

dict. It would be otherwise, had a conditional verdict been found ; which is the usual, and perhaps, the most regular course. Many defects are cured by verdict ; and even if we were of opinion, that the want of an averment of a demand of a conveyance for the Kentucky land, would be fatal, after verdict, yet we cannot consider the case now, as if a verdict had been found, any more than the Court below could. Nor can we say there will be no motion below to amend the pleadings on either side, or that such motion, after demurrer to evidence, would be improper ; or that the appellant may not suffer a non-suit, before verdict found ; no point of this kind being before us.

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As to the merits : The appellee, after craving *oyer*, &c. pleads ; that he has *well and truly performed* all and each of the covenants in the said covenant contained, which, according to the true intent and meaning thereof, he was bound to do and perform.

I shall throw out of my present consideration of the case, those breaches which relate to the assignments of Lee's debt and Bull's mortgage, as I think the issue is supported by the evidence in regard to them. As to the Kentucky land, the plea does not set out the kind of conveyance that was made, or by whom made or procured so as to enable the Court to judge whether it was or was not, a good performance, or an excuse for non-performance ; but is in general terms as above. Whether this plea would have been sufficient to entitle the appellee to judgment, had there been a verdict for him, or should the Court think the issue tendered thereby, supported by the evidence, or whether, on such a plea, there ought to be judgment for the appellant, notwithstanding a verdict finding the issue against him, or a judgment against him on a demurrer to the evidence ; from the view I have taken of the case, I am not now called upon to decide. The first question to be considered is, whether the issue, formal or informal, material or immaterial, which is tendered by the plea, is supported by the evidence ; and to decide this, we must first ascertain what the issue, so tendered, is.



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There are two modes, by which the appellee could be discharged from the appellant's action on this covenant, and either of which, if properly pleaded and made out by evidence, would be a good bar. First, by procuring a proper conveyance from Lang, for so much of the Green River lands as, at \$2 *per* acre, would discharge \$8,333 33, growing due to the appellant under the covenant. Secondly, he would be exonerated from causing a conveyance to be made for *part* of the tract, provided Fitzhugh should cause a proper conveyance to be made of the *whole*. He was not bound to wait to see, whether he might possibly be discharged in this latter way, but had a right to procure a conveyance at once, for the part. It might have been, nay, it surely was, his interest to do this promptly; because, until done, he was in jeopardy. Lang might convey the whole, or a part, to some one else; he might, therefore, have conveyed a part of the tract, or forfeited a part, and his title have been divested, so that his deed for such part would operate nothing, and convey nothing; and should the appellee rely on a conveyance of the whole, through the medium of Fitzhugh, and that deed operate no conveyance as to part, it might not be a performance of which the appellee could avail himself, although it might convey as much as would amount to the sum aforesaid. For, it at present appears to me, though I give no decided opinion on that point, that he could not avail himself of a conveyance of the whole, unless the deed *operated a conveyance* of the whole tract. Which of these bars does he mean to set up by the plea, or does he mean both, and can he rely on both, or either at his pleasure?

If he means the latter, it cannot strictly be called a *performance by the appellee*, of that act which he was to do, or cause to be done, to wit, causing a conveyance to be made of *part of the tract*; but a discharge from his obligation to perform that, in consequence of a conveyance of the *whole tract* being procured by another. On the other hand, if the plea is to be understood as meaning the

performance by the appellee of the act he was bound to perform, unless discharged therefrom by an act done by a third person, then evidence of an act done by such third person, would seem to me not to support the issue tendered.

True, if he had done the *identical act* which he was bound to do by another, as his agent ; in other words, if his agent had procured Lang to convey the part he was bound to procure him to convey, what he had so done by another would be considered as done by himself ; but that is not this case. The evidence only tends to prove, that Fitzhugh, not as his agent, but on his own account, and in discharge of a substantive agreement by himself, procured a conveyance of the whole, which, if effectual for the whole tract, and such a conveyance of the whole as he was to procure for the part, and was received and accepted, so as to make the deed operate by delivery, or was tendered, and was such a deed as ought to have been accepted under the contract, would exonerate the appellee from causing a conveyance of a part.

I think it would be going too far, under the utmost liberality of practice, admissible in regard to these general pleas, to say that evidence of both or either of these bars could be admitted under such plea. This liberality ought not to be sanctioned in a way calculated to produce surprise at the trial. It is not enough to say, that possibly in this case there was no such surprise ; we must look to what might happen under such a plea.

For instance: the appellant may never have accepted the deed procured by Fitzhugh, so as to make it good by delivery, which I apprehend requires the assent of both parties ; he may have returned it, and given both Fitzhugh and the appellee notice thereof, if indeed he was bound to give the appellee such notice, and the latter may have procured one for a part of the tract, which may, in like manner, have been objected to and returned: now, if, on such a plea as this; in its very terms setting out this performance to have been executed on the part of the appellee *himself*,

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1823. he could, on failure to prove that, exhibit proof also of  
*November.* the deed for the *whole, procured by Fitzhugh*, the appel-  
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Fairfax lant would very naturally be taken by surprise, and might
v. not have his witnesses to prove his rejection of that deed.
Lewis.

There are various things that will excuse the non-performance of a covenant, and will be a good bar, if properly pleaded ; but it cannot be contended, as a general proposition, that such things, if given in evidence under the general plea of covenants performed, though not objected to, the party not being obliged to object to impertinent evidence, will support the issue.

The case before us, it appears to me, only differs from general cases of this kind, in this ; that here by a subsequent part of this agreement itself, it appears, that if a certain act is done by a third person, who covenants to do it, and which, as before said, the appellee was not bound to wait for such performance, nor the appellant either, who had a right to call on the appellee at once for the performance on his part, such act, so done, would be an excuse for the non-performance by the appellee. I cannot perceive that such possible excuse, although it arises out of another contract contained in the same paper, exonerates the appellee from pleading it in this case, any more than in any other. It might have happened, either by a subsequent agreement or otherwise, that Fitzhugh would be exonerated from his agreement to convey the whole, or that the appellant and appellee, having rescinded their agreement, he was to convey the part to the appellee, and the residue only to the appellant, and to which subsequent transaction the concurrence of all the parties was not necessary. This shews, that these contracts were distinct and independent of each other.

The propriety of this opinion may be further tested, by considering what would have been the notice of a proper plea, relying on this defence. The appellee would have set out the deed as one procured by Fitzhugh *for the whole tract*, under the second part of the contract, and as excu-

sing him for not procuring a similar deed *for a part*. But, if he had failed to prove that plea, could he, under it, have exhibited evidence that he had *himself* procured a deed for a part, there being no plea to that effect; and would such evidence, though not objected to, support the issue joined? I think not. These two defences then are of distinct natures, and the question recurs, to which of them does this plea apply? I think it applies to *an act to be done by the appellee himself*, and not to an excuse for not doing it; and that there is consequently no proof whatever of the issue on his part.

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This relieves me from the necessity of going into the evidence, or of considering what would be the effect of the deed alledged to have been made, without proof of a delivery; by which I mean, not a mere placing it in the hands of the grantees, but his assent to the delivery; for, if that was necessary to make it a good deed to pass the title, and that did not take place, then the title remains in the grantor or his heirs. Nor shall I enquire whether, if the title never passed, it was nevertheless such a deed as the appellant ought to have received; or if not, whether his failure to give notice, either to Fitzhugh or the appellee, would estop him from saying that it was not such a title as he was bound to receive.

I am also relieved from any minute consideration of the exceptions; though my present impression is, that the certificates in regard to the forfeiture and sale of the lands for the non-payment of taxes, in the form they were made out, were not proper evidence. Nor do I see the relevancy of the parol testimony mentioned in the last bills of exceptions. The opinion of the Court as to Bull's contract, stated in one of the bills of exceptions, I think was correct. I have not considered whether the law of Kentucky has been duly authenticated; possibly it has. But the other testimony being rejected, it became irrelevant. Indeed these bills of exceptions are not before the Court, not being a part

1823. of the record ; nor can they be made such, unless by consent, or by proceeding in the manner prescribed by the act of Assembly.

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As to the other case, that of *Lewis v. Fairfax* ; whatever may be the law of England, growing out of the nature and perplexity of titles there, and of the usage of conveyancers consequent thereon, as to the delivery of abstracts, and the duty of the grantee to prepare the deed, I do not think it applies to this country, or that there is any such usage or practice to support it ; but if there was, it is not alledged that any abstract was furnished, so as to enable the appellee to prepare a deed.

On the whole, I think the judgment first mentioned must be reversed ; the law declared to be for the appellee as to the first two breaches assigned, the issue on his part being supported as to them ; but that the law is for the appellant, as to the third breach, and a writ of enquiry of damages awarded as to that ; and that in the other case, the judgment must be affirmed.

Judge BROOKE, concurred with the other Judges, that the judgment in *Lewis v. Fairfax*, should be affirmed ; and concurred with Judge COALTER, that the judgment in *Fairfax v. Lewis*, should be reversed and a writ of enquiry of damages awarded as to the third breach, but affirmed as to the two first breaches. *

* Judge Cabell absent from indisposition.

SPECIAL COURT OF APPEALS.

Present—Judges *Green, White, Allen, R. E. Parker and Summers.*

TUCKER v. COCKE, &c.

1823.
December.

A conveyance of a particular *tract* of land, without a specification of quantity, does not bind the vendor to warrant a particular number of acres, if there has been no false *representation*, and no *concealment* of facts within his knowledge; although there may have been an *expectation* in both parties, founded on documents and other evidence known to both, that the number of acres is greater than it turns out to be, upon a subsequent survey.

This was an appeal from the Lynchburg Chancery Court.
The case was this :

Tucker and Coles purchased sundry parcels of land of *Edmund B. Norvell*, executor of *Thomas Norvell*, deceased, and *Ann Norvell*, his widow. In the deed which was executed for the purpose, the land is described as “all the land lying upon *Pig* and *Staunton* Rivers, in the counties of *Bedford* and *Pittsylvania*, and all the title, whether legal or equitable, thereto, which the said *Thomas Norvell* acquired, by deed from *Wilson Allen* and *Edmund W. Rootes*.” Tucker purchased three undivided fourth parts of the said land, and Coles purchased one undivided fourth.

The negotiation which ended in the foregoing conveyance, was commenced in the life-time of *Thomas Norvell*,

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Tucker
v.
Cooke.

by a letter from Tucker to him, proposing to purchase the said land; and T. Norvell having died before the letter was answered, his executor, Edmund Norvell, replied to it, informing Tucker that the land was for sale; that Jesse Burton of Campbell county, was fully empowered to sell, to whom he refers him for particulars; and apprising him that there is a suit in the Court of Appeals respecting the land.

In another letter, E. Norvell informs Tucker, that he is still disposed to sell, and that he would be glad to hear from him, "stating the price and terms on which he is willing to purchase."

A written agreement was entered into on the 6th of January, 1818, between the executor, E. Norvell, and Tucker, by which it is stipulated that the former has sold to the latter "a tract of land lying on *Pig and Staunton Rivers*, in the counties of *Bedford and Pittsylvania*, containing, by estimation, ten or twelve thousand acres;" and Tucker agrees to pay for the said land, twenty-seven thousand five hundred dollars; payable one third on the 1st of January, 1819; another third on the 1st of January, 1820; and the remaining third on the 1st of January, 1821; with a deed of trust on the land, to secure the payments. Norvell only stipulates to convey the interest vested in T. Norvell, and to warrant the title against all persons claiming under the said Thomas Norvell.

Coles, though not a party to the written agreement, was a partner in the purchase to the amount of one fourth, as has been mentioned above.

Three days after this contract, the deed was executed to Tucker and Coles, in their respective proportions, as before described; and they thereupon executed their bonds; Tucker giving three bonds, with Coles his security, for three fourths; and Coles giving three, with Tucker his security, for one fourth. They also executed a deed of trust, according to the conditions of the agreement. These bonds and deeds of trust were afterwards assigned to the appellee, Cocke.

Tucker paid two of the bonds; but, having had a survey of the land, which induced him to believe that there was a deficiency in the quantity, he applied to Cocke to make a deduction from the purchase money. This proposition was refused by Cocke; and Tucker exhibited a bill to the Lynchburg Chancellor, making Cocke, Norvell the executor, and the trustees, defendants, praying that a proper deduction might be made for the deficiency of land, and that the defendants might be enjoined from proceeding on the last bond, and the deed of trust.

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In his bill, *Tucker* relies upon the terms of the written agreement, executed before the conveyance, which states that the lands were *supposed to contain from 10,000 to 12,000 acres*. He states, that in the negotiation, the discussion of the parties turned principally upon the *price and terms of payment*, and the title, then contested, by the executors of David Ross; but, that the *quantity* of the land was taken for granted to be from ten to twelve thousand acres and upwards; that no specific quantity was mentioned in the deed; but, that this *unusual* circumstance was noticed and objected to by the complainant; but, after some consideration, the objection was deemed unimportant, and the deed was executed in its present form; that he afterwards had a survey made of the said lands, and they fell short more than two thousand acres of the quantity they were supposed to contain, by both parties, at the time of their agreement; that when he applied to Cocke to allow a deduction in the price, on account of the said deficiency, the latter insisted that the complainant purchased the land *in gross*, and not *by the acre*; that although the purchase was *in gross* and *no particular quantity was warranted*, yet, that both parties, *relying that the land had been previously conveyed, as containing about 10,000 acres, and consisted of old surveys, and upon the general reputation respecting the quantity of the said land, confidently expected that the real quantity would considerably exceed the estimated quantity; that this belief operated*

1823. *on both parties in making the bargain; that the com-*
December. *plainant is persuaded, that the said Edmund B. Norvell*
Tucker *would not have asked so much, if he had known the real*
v. *quantity; and it is certain that the complainant would not*
Cooke. *have given so much, especially as he knew he was purchas-*
ing a title which was then contested by the executor of
David Ross, whose right and interest in the said land, the
said Coles and the complainant have since purchased for
the sum of \$7,000; that upon investigation of the title pa-
pers, he cannot discover that the said David Ross, (whose
title the said Thomas Norvell had purchased under a deed
of trust,) ever had title to as much as 10,000 acres; that
Thomas Norvell never paid taxes for more than 9,537
acres, which facts have come to the knowledge of the com-
plainant since his purchase; that he had no better opportu-
nity of knowing the quantity of the land than the said Nor-
vell, as he lived 30 or 40 miles distant, and had never seen
it before his purchase; and although he had been counsel
in an action of ejectment brought by Thomas Norvell
against David Ross, to recover part of the said land, yet
no title papers were necessary in the said action, but the
conveyance of the said Ross to his trustees, and from them
to Norvell; and he does not recollect that he examined
even these, till some time after his purchase.

The Chancellor denied the injunction, but it was afterwards awarded by a Judge of the Court of Appeals, to restrain the trustees from selling, to the amount of \$5,000 of the principal debt, with interest.

Edmund B. Norvell, states in his answer, that when he entered into the written agreement, he had no knowledge of the quantity of the land in question, having never seen any of the title papers relative to it, and having no knowledge of the quantity of land, for which his brother had paid taxes, nor what was the amount estimated on the Commissioner's books; but, that all that he had learned on the subject, was from vague report: that he had understood that his brother had purchased the land at the estimated

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quantity of 10,000 acres; and he had heard it as the opinion of others, that the tract would hold out more than 10,000 acres; but, whether it would exceed that quantity, the respondent had no means of judging: that he does not admit that, in the negociation, it was taken for granted, that the quantity of land was from 10,000 to 12,000 acres; and he is confident that no such thing was mentioned at the time: that he does not admit, that a deficiency in quantity was never contemplated by the parties, and therefore not provided for; because, although the respondent did expect that there would be found more than 10,000 acres in the tract, yet, such was the vague and unsatisfactory information on which they both acted, that it was certainly in the contemplation of the respondent *that there might be a deficiency*, and he thinks it must have been in the contemplation of the complainant also; and he is confident that both parties intended to make provision for such deficiency, and believed that they had done so, *by a contract for a sale in gross, whereby the purchaser took the risque of quantity*: that the contract was written by the complainant, and the expression that the tract of land contained "*by estimation, ten or twelve thousand acres,*" was selected by himself, and founded on nothing which had passed during the negociation, unless upon the great vagueness and entire uncertainty of the quantity of land sold, and was regarded by the respondent as an evidence that no definite quantity of land was intended to be stipulated for: that, by the recital of the deed from the trustees of Ross to Thomas Norvell, (which the respondent had never seen till after his sale to the complainant,) it was stated that the tract was *supposed to contain 10,000 acres*: that the complainant had been employed as counsel in a suit concerning a part of the said land, in which the title papers must necessarily have passed under his view: that the respondent having refused to warrant the title, except against his testator, and those claiming under him, the attention of the complainant was particularly attracted to the title of the land, and, of course,

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to the title papers: that the respondent considered that the sale made by him was a sale *in gross*, whereby the purchaser was to take the whole *risque* of quantity, and was to pay the whole purchase money, whether the tract held out much or little, and that whatever excess was found in the quantity, the plaintiff would be entitled to it without paying more than the stipulated price: that the exigencies of T. Norvell's estate required an immediate sale of the land, and in such manner as to leave no ground for controversy about the payment of the purchase money: that, in consideration of these circumstances, the respondent agreed to take less for the land, than he would otherwise have taken, and much less than his testator held it at in his life-time: that, if the objection was ever made by the complainant, that no specific quantity was ever mentioned in the deed, as stated in the bill, his *relinquishment of it afterwards* proves that, in the opinion of both parties, the purchaser took the *risque* of quantity: that he had no *confident belief*, as the bill states, that the real quantity would considerably exceed the estimated quantity of land, as he had no *data* on which to form a judgment: that he believes that, during the negotiation, he did express to the plaintiff the opinion, that the tract would hold out more than 10,000 acres; but he did not profess to give the complainant any information on the subject, but only founded this opinion on facts, and the opinion of others, concerning which the respondent knew more than himself: that he does not know whether his testator paid taxes for as much as 10,000 acres, having never seen the documents in relation to that subject, before the sale: that, for these reasons, he does not think that the complainant is entitled to any deduction; but, if he is, it can only be for a deficiency of the land below 10,000 acres.

Jesse Burton states, that he had frequent conversations with Tucker and Edmund B. Norvell, during their negotiation for the land in question, and he understood that Tucker purchased, *just as it stood*, taking on himself all

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risque as to *quantity* as well as title: that, from the best information he could collect from the neighbors, it appeared to be their opinion, that the land would probably hold out 12,000 acres; which opinion the witness communicated to both parties: that those neighbors did not state any fact upon which this opinion was founded, except the immense boundaries of the land: that, before the sale, the witness urged *E. B. Norvell* to ask a higher price than he seemed disposed to take, and his reply was, that he wished to wash his hands of it, and have nothing more to do with it: that he was the agent for leasing the said land, and paid the taxes: but that the plaintiff never enquired of him, upon what quantity he paid taxes, as well as he recollects: that he is under the impression that several conversations took place, in his presence, between *Norvell* and *Tucker*, in relation to the said land, before the sale; and he does not recollect that a less quantity was ever contemplated, than 10,000 acres.

James C. Moorman states, that he understood from *Tucker*, that he was to take the interest of *Norvell* in the estate, supposed to contain 10,000 acres, *more or less*, and to give \$27,500: that he was anxious to become a partner in the purchase, and should have considered himself as taking the *risque of quantity*: that he had offered *Norvell* \$35,000 for the land, with *general warranty*; but that the latter refused, saying that he only intended to sell his testator's interest: that the parties spoke of 10,000 acres, but, it being an old survey, they thought it would hold out more.

The deed, from the trustees of *Ross* to *T. Norvell*, conveys the land, as "being *supposed* to contain 10,000 acres."

The Chancellor dissolved the injunction; and an appeal was allowed by one of the Judges of this Court.

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Leigh and Call, for the appellant.

Johnson and Wickham, for the appellee.

On the part of the *appellant*, it was admitted, that the deed from *Norvell* to *Tucker* contained no specification of quantity, and therefore the appellant must depend upon extraneous evidence. That such evidence is admissible, is proved by the cases of *Quesnell v. Woodlief*, 2 Hen. & Munf. 173; *Jolliffe v. Hite*, 1 Call, 301; *Nelson v. Matthews*, 2 Hen. & Munf. 164. But, it would be improper to resort to *parol* testimony to explain the intention of the parties, while there is the more authentic evidence of a *written contract under seal*. Confining ourselves, therefore, to this document, we find that the land was conveyed as "*containing by estimation ten or twelve thousand acres.*" The parties contemplated a sale of land, which was to amount to *at least* 10,000 acres. Even if the expression "*more or less*" had been used, the cases of *Quesnell v. Woodlief* and *Jolliffe v. Hite*, prove that such expression would only cover a *small* deficiency, not such an enormous one as occurs in this case, as 1,085 acres, according to the lowest estimate, or 1,673 acres, according to the highest. *Nelson v. Matthews*, confirms this principle. The case of *Hull v. Cunningham*, 1 Munf. 330, proves, that a mistake as to the *boundaries* of land will be a good ground for relief. It is a well known principle, that when the vendor's own title papers call for a less quantity than that which he sells, the vendee shall be relieved. *Duvals v. Ross*, 2 Munf. 290. The deed from the trustees of *Ross* to *T. Norvell*, states that the land was *supposed to contain* 10,000 acres; and, therefore, *E. Norvell* the executor was guilty of a *constructive* fraud in stating the amount in the written agreement, at *ten or twelve thousand* acres. *Gross negligence* is equal to *intentional fraud*; and if *E. Norvell* did not take the trouble to examine the deed, by which his testator held, he cannot pro-

tect himself by such culpable neglect. Where there is a mutual mistake, a Court of Equity will grant relief. 13 *Ves.* 125, 427. Contracts of hazard are not to be encouraged; as they are, in truth, nothing more but a species of gambling. 1 *Anstruth.* 64; 10 *Ves.* 209. Here the parties never treated for less than 10,000 acres. The deed to *T. Norvell* called for that quantity; and it was the duty of his executor not to sell it for less. He accordingly states it at that quantity in the written agreement; but goes further, and excites an expectation, not justified by his title papers, that it *may* contain 12,000 acres.

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As to the depositions of *Moorman* and *Burton*, they are inadmissible. *Parol* evidence cannot be received, to explain a written contract under seal, except in certain specified cases, none of which apply to the present case. The only question is, whether, under the words of the contract, the vendor sold any precise quantity, or made a representation, which turns out to be untrue. But, these depositions, if admitted, are very far from supporting the appellee's pretensions. *Moorman* only proves a contract for 10,000 acres, *more or less*. It has been often decided, that these words only cover a small deficiency in quantity. As to *Burton's* deposition, he gives his *inferences* instead of *facts*. His opinions are formed upon *Norvell's* representations.

As to the presumption of information in *Tucker*, from his vicinity to the land, and from his being employed as counsel in an action of ejectment for part of this very land, the first is unfounded in fact, and the other is refuted by *Tucker's* declaration in his answer, that the suit in which he was engaged as counsel, did not require any other title paper than the deeds from *Ross* to his trustees, and from them to *Norvell*; and, that in point of fact, he had never seen any other title paper.

For the *appellee*, it was said, that it appeared by the bill of the *appellant* himself, that he had no shadow of right to a decree in his favor. By his own statement, the con-

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tract was a bargain of *hazard*, by which he took the chance of *loss*, if the land should prove deficient; and, of *gain*, if there should turn out to be an excess. The bill admits that *Tucker* bought the land in *gross*. It is not pretended that *Norvell* knew more than *Tucker* about the land. A deed was executed *without any specification of quantity*. This omission was objected to by *Tucker* before the execution of the deed; but, after some discussion, it was waived, and the deed suffered to remain without any mention of the number of acres. And yet, the appellant contends, that the appellees *warranted* a certain quantity; by which, he would have the benefit of any, *excess*, while the vendor would not derive advantage from any *deficiency*. Such a contract would be highly improbable in any man, and much more so in an *executor*, who was to derive no personal benefit to himself, and might sustain a personal loss.

But, it is contended, that we may resort to the *written contract* to explain the deed, while we are precluded from relying on the *parol* evidence. But, the contract itself, cannot be resorted to, upon the mere ground of *variance* between it and the deed; because, in that case, it will be presumed that the variance was intentional, and that the parties thought fit to change the terms of the contract before the execution of the deed, as is clearly proved by the decisions respecting marriage articles. *Legge v. Goldwire*, Forrester 20; *Fearne's Cont. Rem.* 4th edit. 124; 1 *Fonb.* 190, n. p.

If, however, we resort to the written contract, it proves nothing, but a sale in *gross*. It describes the land as a tract of land "*containing by estimation 10,000 or 12,000 acres;*" that is, the same land that *T. Norvell* purchased of the trustees of *Ross*; and, that *Norvell*, the executor, is only to convey *the interest vested in the said T. Norvell to said land, and to warrant the title against all persons claiming under the said T. Norvell*. These expressions can convey no other meaning than that of a sale in *gross*, without responsibility in the vendor for any de-

ficiency, and without right to gain by any excess. The *vagueness* of the quantity mentioned shews, that those expressions were mere terms of *description*, and not *conditions* of the agreement.

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But, if we go beyond the deed, we are at liberty to look into the *parol* evidence, as well as the written agreement. All the cases which have been cited on the other side, prove, that there is no exclusion of *parol* evidence, if a proper case made out for admitting evidence extraneous to the deed. If the depositions are admitted, they place the subject beyond doubt. *Burton* proves that he was present during the negotiation, and that he understood the contract to be such, that *Tucker* took the risque of *quantity* as well as title. *Moorman's* testimony confirms *Burton's* in this particular, and proves *Tucker's* declaration, that he bought the land for *more or less*. When these words are coupled with the phrase *by estimation*, they amount to a sale in *gross*. A mistake in both parties, as to a matter of opinion, has never been considered a ground for relief. There is no case of a *bargain of hazard* made upon equal terms, where the losing party has been relieved. In most of the cases, the vendor has more information than the vendee, and either makes a false representation, or suppresses that which he ought to communicate; but, in this case, *Tucker* had at least as much information as *Norvell*, if not more. The parties in this case both speculated on the probability of an *old survey* being short of the actual quantity. Their bargain was formed on the idea of this uncertainty. The grounds of opinion were open to both. No fraud, no suppression of facts can be imputed to either. It was, in short, like the ordinary case of insurance, where the event is doubtful to both parties.

The case of *Jolliffe v. Hite*, 1 Call, 301, is in strict conformity with these ideas, and establishes the principle, that in a sale in *gross*, the parties take the risque of quantity; and, that in such a bargain, the words *more or less* cover any deficiency, however great. Indeed, in a sale

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Nelson v. Matthews, 2 Hen. & Munf. 164, is not applicable to this case. That was the case of a sale of land as containing a certain number of acres, when the vendor's own title deeds called for less than such specified quantity. The case did not turn on the words *more or less*, but upon the constructive fraud.

The case of *Hull v. Cunningham*, 1 Munf. 330, is no authority against the appellee. That was a sale *in gross*, and a mistake was committed as to the *boundaries* of the land. Relief was very properly granted to the purchaser in that case, because he had bought a particular *tract*, and an error having been committed as to its boundaries, he could not get the *specific thing* he had purchased.

As to the case of *Quesnell v. Woodlief*, 2 Hen. & Munf. 173, it is incorrectly reported. It turned on the ground of fraud. *Quesnell* was a Frenchman, ignorant of our language, customs and laws. The vendor sold *by the acre*. He represented that there was an old survey, that called for a certain number of acres, which was *not true*. On the ground of these circumstances of imposition and false representation, *Quesnell* obtained relief. But, here it cannot be pretended that *Norvell* made any false representation.

The case of *Duvals v. Ross*, 2 Munf. 290, simply affirms the principle of *Nelson v. Matthews*.

The case of *Bedford v. Hickman*, 2 Munf. 294, (reported in Judge *Roane's* opinion in *Duvals v. Ross*,) is also a case of *constructive fraud*; the vendor having conveyed land as containing a greater number of acres than his title deeds warranted.

Nelson v. Carrington, 4 Munf. 332, was a sale of land by the *acre*, and therefore not applicable to the present case.

Fleet v. Hawkins, 6 Munf. 188, belongs to that class of cases which affirm, that a sale *in gross* does not bind

the vendor to convey a certain number of acres, even although a number of acres be mentioned, *by way of description*. 1823.
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As to the *taxes*, *Norvell* avers in his answer, that he did not know their amount; and no man consults Sheriffs' receipts to ascertain the quantity of his land.

December 4. Judge GREEN, delivered the following, as the unanimous opinion of the Court :

If the appellant, provided he had not accepted the deed, would have been entitled to the relief for which he asks, his acceptance of the deed ought not to preclude him from claiming it now. The mistake in the quantity of the land, was not, and could not be ascertained, until after the execution of the deed. That was executed only three days after the execution of the contract. The deed may be evidence of the then understanding of the parties, as to the terms of the agreement, but not a bar to relief, if a proper case for relief in other respects, were made out.

Whether the circumstances of this case would or would not authorise the admission of *parol* evidence to explain the written agreement, it is unnecessary to decide. If the written contract be mistaken or equivocal as to its terms, the parties may explain it according to their real and original intention, either by a new instrument of writing, or by their admissions of record. The contract in this case was, upon its face, equivocal, and of doubtful construction. But, the appellant's bill states the real terms of the agreement, to the same effect as the *parol* proofs in the cause. It states, that "both parties, relying that the lands had been previously conveyed as containing about 10,000 acres, and consisting of old surveys, and upon the general reputation respecting the quantity of the said land, confidently expected that the real quantity would considerably exceed the estimated quantity, and that this belief operated on both parties in making the bargain;" and that "during the whole negotiation for the purchase, which continued seven-

1823. ral days, the discussions of the parties turned principally
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Tucker which was then controverted by the executor of *D. Ross*;
v. but that the quantity of land was taken for granted, to be
Conko. from 10 to 12,000 acres, and upwards; and that a deficiency was never contemplated by the parties, and, consequently, was not provided for;" and that "his purchase was *in gross*, and no particular quantity was warranted." This last declaration is equivalent to an assertion, that the purchase was not by the acre, or of any particular quantity of land; but of a tract of land in bulk, for a price in gross, upon the belief of both parties, that it would turn out 10 or 12,000 acres, or more; but, without regard to what it might actually turn out to be, and without contemplating a responsibility of either party, in case of an excess or deficiency. For, a sale by the quantity would have been in effect a warranty on the part of the vendor; of the quantity sold. This accords with the cotemporaneous construction given by the parties, in executing and accepting a deed for the entire tract of land, without the specification of boundaries or quantity. If 10 or 12,000 acres of land had been the subject of the contract, and the quantity had been considered as material, it would have been stated in the deed; the object of the deed being to convey what had been sold. The written contract is fairly susceptible of the same construction. If quantity was the real object of the purchase and sale, although the parties had not the means of ascertaining that truly, they would have stated, upon conjecture, a specific quantity; so as to afford some rule for the measure of compensation for the deficiency or excess, when ascertained. The indefinite expression of 10 or 12,000 acres afforded no such rule, and shews that the subject of quantity was not really in the contemplation of the parties, as one of the terms of the contract. It was an expression, apt enough as one particular of the description of the "tract of land" sold, and was probably introduced for that purpose only. This conclusion is warranted by the

terms of the contract, and is rendered certain by the admissions in the bill. The purchaser took upon himself the risque of quantity and title; and although both parties were influenced, in their agreement as to the price, by the belief that the tract of land contained more than the estimated quantity, as stated in the conveyance from *Ross's* trustees to *Norvell*; yet, the hazard of loss to one party, in the event of an excess, and to the other, in case of a deficiency, which, although not expected, was possible, would also influence the parties in fixing the price. It cannot be known or presumed, that if *Tucker* had insisted, that *Norvell* should warrant that the tract contained 10,000 acres, he would have consented to do so, upon any terms, or that he would have taken the price which he agreed to take, upon the contract in question.

The estimation of the quantity was made by both parties, upon the same facts, which were equally known to both. *Norvell* did not take upon himself, to make any affirmation or representation in respect to quantity. He only declared his real opinion, founded upon the very same information which *Tucker* had, and in which the latter concurred with him, without being influenced by the opinion of the former. He concealed no fact within his knowledge, which could, in any degree, influence that opinion. He had not seen the receipts for taxes, and he was guilty of no negligence (if that were material) in not searching for them, and examining them, as a means of ascertaining the quantity. The source of information on that subject, which he would most naturally and reasonably resort to, was, the conveyance under which his testator claimed; and being informed that the conveyance called for *about* 10,000 acres, he had no motive for further enquiry; and if he had, he could not have expected any thing like accurate information, from the Sheriff's receipts for taxes.

This was, therefore, a contract of hazard, without any fraud, concealment, misrepresentation, or negligence, on

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the part of the vendor. The error in respect to the quantity of land, was mutual, and was not in relation to the substance of the thing contracted for, but in relation to the very hazard contemplated by the parties. The question is, whether the disappointed party is, in such case, entitled to relief; and this was the question which the appellant, with perfect frankness, intended to submit to the judgment of the Court.

. There are cases in which the mutual error of the parties, without default in either, may be a just ground for rescinding a contract. As, if the error be in a matter which is the cause of the contract, that is, in the *substance* of the thing contracted for, so that the purchaser cannot get what he bargained for; as in the case of a purchase of military lands on *Paint Creek*, stated to be located under specified warrants, and the warrants were located *elsewhere*; and of the purchase of an obligation at the risque of the purchaser, and the paper turned out to be forged, or the obligor to have been previously discharged from the obligation, under the statute of bankruptcy. In such cases, the contract ought to be vacated, even if it had been executed; and, if both the parties, in the first case, verily believed that the warrants were located on *Paint Creek*; and, in the other, that the obligation was genuine and the party bound by it; the object, in the first case, being to buy lands on *Paint Creek*; and, in the other, to buy a valid and subsisting obligation, the error would go to the *substratum* of the matter contracted for. *Chamberlayne v. Marsh*, 6 Munf. 283; *Armstrong v. Hickman*, Ibid. 287. But, if in the one case, the warrant had really been located on *Paint Creek*, and the parties had both been of opinion, from the general character of lands on that Creek, that the lands were of great value, and it had turned out that they were of very little value; or, if in the other, the obligation had been genuine and still binding upon the obligor, and both parties believed that he was in affluent circumstances and able to pay, and it turned out that he was, at the time of the contract, utterly insol-

vent; the purchaser, in neither case, could have relief, since he has gotten that which was the cause of the contract, and the error was in relation to the very hazard, which the purchaser took upon himself. If relief could be given in such a case as the case at bar, *a fortiori* it should be given, if the vendor knew of the deficiency and concealed it. So that, in both cases, when the vendor knew, and when he was ignorant of the deficiency, relief being given, there could no longer be a contract, in which a purchaser could take the risk of quantity effectually upon himself. The Court of Appeals have uniformly recognized the validity and obligation of such a contract, and in all cases in which they have given relief, it has been founded on circumstances either of fraud, misrepresentation or concealment; or mistake in part, or in whole, in relation to the substance of the *thing contracted for*. It is possible, that the case of *Quesnell v. Woodlief*, 2 Hen. & Munf. 173, does not fall within this observation; but, the grounds of the judgment in that case are so uncertain, some of the Judges who decided it, the Reporter and the counsel on both sides, who argued the cause, differing so materially in their statements of the reasons upon which the judgment was founded, that it cannot be considered an obligatory authority to the point now under consideration; and, if it were so considered, it has been repeatedly overruled.

The Court is unanimously of opinion, that the decree is right and ought to be affirmed.

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*December.***NORVELL v. CAMM and others.***

In what case a Court of Law should compel a party to join in a demurrer to evidence.

Where an objection is made to a demurrer to evidence, that the testimony of a witness has not been correctly taken down, and the witness himself has left the Court, so that he cannot correct the supposed error; this will not be a sufficient excuse for not joining in the demurrer, unless the error complained of is stated, and it also appears that it would affect any of the questions to be decided by the Court, on the demurrer.

If any portion of the land described in the count in a writ of right is included in the patent under which the demandant claims, it is sufficiently identified.

This was a writ of right brought by Norvell, the appellant, against John Camm and wife, and John Warwick and wife, on the 24th September, 1812, to recover 433 acres of land in Amherst, held by the tenants, Camm and Warwick, in right of their wives, the daughters and heirs of Thomas Powell, deceased.

The count, plea and replication, are regularly filed, and the *mise* joined, in pursuance of the act of Assembly.

The cause came on for trial at the September term of Amherst Court, in the year 1813, when a general verdict was found for the tenants, and a judgment rendered in their favor, from which the demandant appealed; an exception having been taken by the demandant, to an opinion of the Court, given by way of instruction to the jury, during the trial.

The tenants' counsel, on the trial, had moved the Court to instruct the jury, that a patent, under which the demandant claimed, was void, inasmuch as it was founded on a land-office treasury warrant, entered on land which was not at the time waste and unappropriated; and to shew, that the land was not so waste and unappropriated, he produced a patent for a larger tract, embracing the same land, which had been issued to James Christian, John

* Judge BROOKS sat in this cause, in addition to the Judges in the last case.

Christian, and William Brown, on the 10th September, 1755; also, a judgment of the General Court, pronounced in April, 1774, declaring the land aforesaid to be forfeited, and vested again in the Crown, and that John Christian and Charles Christian, (sons of one of the patentees,) were the first petitioners therefor, and had prosecuted their petition with effect; he also produced regular conveyances from John and Charles Christian, the petitioners, down to Powell, the ancestor of the female tenants. The Court, upon these facts, was of opinion, that the demandant's patent was void, and so instructed the jury.

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A Special Court of Appeals, before whom this case was tried, in December, 1818, *8 Munf.* 233; (see also, *2 Munf.* 257,) reversed the judgment of the Superior Court of Law, on the case made by the bill of exceptions; declaring that it was not competent, at law, thus to impeach the demandant's patent. And they remanded the cause for a new trial, with directions that the evidence, which had been offered by the tenants, should not be again admitted.

The cause came on again to be tried at the April term of the said Superior Court, in the year 1820, between the same parties, except John Camm, one of the tenants, who was dead, when the jury again found a general verdict for the tenants, and judgment was rendered in their favor. From this judgment, the demandant again appealed.

There are two bills of exceptions filed upon the last trial: The first is by the tenants, for this cause.

After the tenants had introduced evidence to prove very long possession of themselves, and those under whom they claimed, and other facts and circumstances, on which they rested their title; the demandant offered in evidence, the record of the proceedings of the former District Court of Charlottesville, upon an ejectment therein decided, in which the same Camm and wife, and Warwick and wife, were plaintiffs, and the same Reuben Norvell was defendant, and in which a special verdict had been found, ascertaining the following things:

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1. That a patent issued to James Christian, John Christian, and William Brown, on the 10th September, 1755, for 3,926 acres of land; which patent is found in *hæc verba*.
 2. That, before the year 1765, James and John Christian, two of the patentees, died; the land not having been divided.
 3. That, after the death of said James and John, two of the sons of John, petitioned the General Court for said land, as forfeited for *non-payment* of quit-rents; on which petition, a judgment of the General Court was rendered, on the day of April, 1774, which judgment is found in *hæc verba*.
 4. That, on the 30th October, 1777, the petitioners John and Charles Christian conveyed 933 acres, part of said patented land to James Grissom, by a deed found in *hæc verba*.
 5. That, on the 21st August, 1787, the said James Grissom conveyed to Thomas Powell 433 acres, part of the said 933; by deed in *hæc verba*.
 6. That the land mentioned, in the declaration in ejectment, is the same 433 acres conveyed by Grissom to Powell.
 7. That the wives of the plaintiff's lessors, were the daughters, and only lineal descendants of the said Thomas Powell, who departed this life, intestate, on the day of 1788.
 8. That the said lessors, and those under whom they claim, had been in undisturbed possession of the lands, in the declaration mentioned, from the year 1775, until November, in the year 1800; when Norvell entered upon the possession of the wives of the lessors, and ousted them.
 9. That the lessors, and those under whom they claim, had regularly, until the present day, (the day of trial,) paid the taxes to the Commonwealth, upon these lands.
 10. That the defendant Norvell, had obtained a patent including about 330 acres of the land in controversy, founded on a Land-Office Treasury Warrant, entered with the sur-

veyor of Amherst county, on the 4th day of September, 1794, which entry they find in *hæc verba* 1823.
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11. That he surveyed said land, on the 27th November, 1795, by a survey, which is found in *hæc verba*. Norvell
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The patent dated 3d November, 1797, is also found in *hæc verba*.

12. That the original patentees, or their survivor or survivors, remained in the possession of the lands mentioned in the declaration, from the day of 1761, till the petitioners obtained possession thereof.

13. That the defendant Norvell had remained in possession from the time of his ouster aforesaid, till the time of the verdict.

This record was offered by the demandant, as he states, in the bill of exceptions, for the following purposes:

First, to rebut any presumption, that a patent for the land in controversy had issued to Rockyrun John Christian, a son of John Christian, who, the demandant contended, was one of the patentees.

Secondly, to repel the presumption that the land granted as aforesaid had not reverted to the Crown. And

Thirdly, to repel any presumption which might arise from evidence afforded by the tenants, to prove that the land was claimed by John Christian, the father of John Christian of Rockyrun, after the year 1774.

The record was objected to by the tenants, both on the ground that the special verdict purported to prove matters of record which were susceptible of higher and better proof, and upon the general ground, that the said record was in no respect proper evidence in that action.

The Court overruled the objection, and permitted the evidence to be given for the purposes above-mentioned.

The second exception is by the demandant; for this cause:

The demandant's counsel, on the second day of the trial, tendered to the Court a demurrer to the evidence, alleging that it contained all the evidence which had been given on both sides; in substance as followeth:

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1. The testimony of James London, examined in Court, who proved, that he had been acquainted with the land in controversy ever since he knew any land, and that he was then 87 years of age; that the land had been settled and improved several years before Braddock's defeat, which was in 1755; the land was then claimed by a man named John Christian, and was settled and improved, in his name and for his benefit, by a man sent there for that purpose; that there were successive tenants on the land from that time till the year 1763; sometimes poor persons occupying the land, as the witness understood, by the permission of said Christian, and sometimes the overseer and hands of the said Christian; that he remembers particularly the said John Christian's two sons, Charles and John, living on the land, within the period aforesaid, as their father's overseers, and making crops thereon for him; that he had, within the same period, seen the collector of the revenues going to the land to collect the public dues, but did not know whether they were paid or not, but that there was generally property enough on the land to pay them; that about the year 1763, the said John Christian broke up his quarter on said land and removed his hands; after which time the land was in possession of different tenants; that he never heard of any right, adversary to that of John Christian; that some time afterwards, Jno. Christian died, and then his sons, Jno. Christian of Rockyrun, and Charles Christian, who had been his overseers, as above stated, claimed said land, but by what title the witness knew not; that he had understood that said John of Rockyrun and Charles, sold the land to a man who sold it to the ancestor of the present tenants, and that he never heard of any claim to said land, adverse to that of the said Christians, and those who claim under them, until the present demandant set up a claim thereto.

2. The testimony of John Christian, who, being examined in Court, swore, that he became acquainted with the land in controversy in 1760, when it was occupied as a

quarter by John Christian, the father, mentioned in James London's evidence; that in that year the quarter was broke up, and the land put into the possession of sundry tenants, claiming under said John Christian, who, he believes, held it every year, till the year 1773; that in that year John Christian, the father, being dead, John Christian of Rockyrun, his son, told the witness he believed the land was lost, that he expected to get it, and for that purpose had filed a caveat or petition; that said John of Rockyrun then requested the witness to take possession of said land for him, the witness expecting to buy it of said John; that the witness in '73 went upon the land, and finding it out of repair, did not occupy it himself, but put another tenant on it for said John Christian of Rockyrun; that afterwards, said John Christian of Rockyrun told the witness, as he thinks, that he had obtained the land, and had got a grant, or patent, or some such thing therefor; that said land was afterwards occupied by the tenants of said John Christian of Rockyrun, till he sold the same to a man named Grisson, who took possession thereof under the purchase from him, and continued in possession until he sold it to Thomas Powell, the father of the tenants, who some time afterwards died; that he had understood that the land in controversy, with other land to a considerable amount, had been taken up some years before the witness knew it, by the said John Christian, the father, together with James Christian and William Brown, the latter of whom survived the other two; that when John Christian of Rockyrun told the witness he supposed the land was lost, the witness supposed he meant it had been lost by the non-payment of quit-rents; and that John Christian, the elder, at his death, had several children other than John of Rockyrun, one of whom, to wit: William, was the eldest son, died about the year 1808.

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3. The testimony of Walter Christian, who, being examined in Court, swore, that he had known the land in controversy about 35 years; he had known it in the pos-

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session of Grissom, of Thomas Powell, the ancestor of the tenants, of the tenants themselves, since the death of Powell, and also in the possession of the demandant; whether as tenant or claimant, he did not know.

4. The testimony of Nelson Crawford, who swore that he knew Thomas Powell, the father of the tenants, who was in possession of the land in controversy, and who died about the year 1789, or 1790, intestate, leaving only two children the present tenants, his heirs at law, then infants of very tender years, the eldest about 6 years old.

5. The commissioner's books of the county of Amherst, shewing that from the year 1787, at least, up to the present day, the land in controversy has been regularly charged to the tenants, and those under whom they claim; and proof that the tenants, and those under whom they claim, have always been fully able to pay all public dues on said land, and that from the year 1787, there has always been property enough on said land to pay the taxes.

On the part of the demandant:

1. The record of the proceedings, in ejectment, above-mentioned.

2. A patent, for 669 acres of land, granted to the demandant by virtue of a Land Office Treasury Warrant, surveyed in 1795; the patent dated 3d Nov. 1797.

3. Another patent for 798 acres, dated 12th June, 1813, founded on a Land Office Treasury Warrant, surveyed 28th February, 1804.

4. A judgment of the General Court, on the petition of John Christian and Charles Christian, declaring a grant issued to James Christian, John Christian and William Brown, for 3,986 acres of land in the county of Amherst, formerly Albemarle, on the waters of Rockyrum and Porridge Creek, to be forfeited for non-payment of quit-rents, and the land re-vested in the Crown, and certifying John and Charles Christian to be the first petitioners, &c.

5. A witness, John London, who stated, that he had been present at several surveys which had been made of

the lands in controversy; that he was well acquainted with the boundaries of the patents procured by the demandant, and that he believed that the said patents embraced all the land in controversy; and that the same were now in possession of the tenants; and that he considered the annual value of the land was 250 dollars.

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6. An entry for 990 acres of land, in the name of John and Charles Christian, made October 14, 1794; and the further evidence of said London, who swore, that the entry might or might not embrace the land in controversy; but that he believed the whole of it was within the patent of James Christian, John Christian, and Brown.

7. Another entry in the name of Charles Christian, for 1000 acres of land, made September 8, 1794; which entry appeared to have been transferred to John Christian, and surveyed for him; also, the evidence of the same John London, who swore that he believed the whole of this entry to lie within the patent to the Christians and Brown, above-mentioned, but that it might or might not cover the lands in controversy.

8. A paper signed John Christian, and Charles Christian, and dated October 28, 1795, authorising the assignment of an entry within the bounds of Christians' and Brown's patent, to Charles Christian; and the testimony of a subscribing witness thereto, proving his hand-writing as witness, but knowing nothing of the execution of the paper, or who are the parties to it.

The demurrer, containing this statement of the evidence, was offered; and the tenants' counsel refused to join in it, for the following reasons:

1. Because they did not admit, that the evidence of James London had been correctly taken down in the demurrer; it having been written on the second day of the trial, though the witness, who had been examined on the first, had been discharged from Court, by the consent of both parties, on account of his age and infirmity; no intimation then having been given by the demandant's coun-

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sel, that they meant to demur to the evidence; though the tenants had gone through the whole of their testimony, and the demandant had examined the greater part of his.

2. That as the tenants would contend, upon the evidence offered by them, that the jury might infer a patent, to some one of those under whom they claimed, the evidence ought not to be demurred to, unless the demandant would admit the fact, which it was the tendency of that evidence to prove, to wit: that there was such patent; which fact the demandant refused to admit.

3. Because the demandant has offered evidence to repel that offered by the tenants, the truth of which evidence, the tenants do not admit. And

4. Because the tenants do not admit, that the demandant has proved any title whatever to the land in controversy; they contesting both the credit and sufficiency of the proof to show that his patents cover the land in controversy.

The demandants' counsel insisted on the tenants' joining in the demurrer, alledging:

1. That they considered, that the demurrer contained the whole evidence on both sides.

2. That the discharge of the witness was assented to by them on his declaration that he could hardly get out of the Court-house, and that the tenants' counsel had his deposition; and because, at the time of his discharge, the evidence not being finished, they had not then concluded to demur.

3. That the demandant then offered to send for the witness, James London, who lived about eight miles from the Court-house, if the cause could be continued until the next day; or to suffer the Court to make any change they thought proper in the statement of the evidence of said London, if they thought it not correctly stated.

4. That the other objections made by the tenants' counsel were of a legal nature, to be decided by the Court. And

5. That the only difference between the counsel as to the testimony of James London was, whether he spoke of the sale being made, and title claimed by John and Charles Christian, or by John only.

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The Judge not being able to decide the difference between the counsel as to the evidence of James London, his memory not serving him sufficiently therefor, and it being proved that the said John London is probably too unwell to attend the Court again, and deeming it improper to compel the tenants to join the demurrer, the Court refused to compel him to join : And to this opinion, the exception was taken.

On the next day, the demandant moved for a new trial, upon an affidavit, that since the trial he had recollected a witness, who could prove some declarations of John and Charles Christian.

This motion was overruled.

*Stanard*, for the appellant.

The decision of this very case in the Special Court of Appeals, 6 *Munf.* 239, is to be regarded, not merely as a *precedent*, but as giving the *law* which is to govern this case. But the inferior Court, by refusing to compel the tenants to join in demurrer, and permitting the jury to render a general verdict, left them at liberty to impeach the patent of Norvell, by any *presumptions* and *inferences* that they might please to draw. Thus the consequence, which the Court intended to prevent, would be incurred.

The circumstances, leading to the presumption of the existence of a patent, are proper for a *Court* and not a *jury*. It is like the case of evidence of declarations *in extremis*, where the *Court* and not the *jury* are first to decide whether the party was *in extremis* or not. So in the case of a *lost paper*, the *Court* must first be convinced that the paper once had an existence, before evidence can be given to the *jury* of its contents.



1823. This doctrine is fully confirmed by a case in Pennsylv-  
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But, if the judgment of the Special Court does not preclude the tenants from going into this evidence, the decision of the Superior Court was wrong, upon principle. The evidence of the tenants, goes to prove a possession from the year 1755. This possession was not regular and uninterrupted, but broken by the judgment of the General Court in the year 1774, declaring the land to be forfeited for non-payment of *quit-rents*; and the possession of the tenants after that period, was founded on the *destruction of the first title*. The evidence can only lead to the *patent* in 1755, as the source of the subsequent possession; and as that patent has been defeated by the judicial proceedings above-mentioned, and the decision in this very case, in the Special Court, the tenants cannot derive any support from that evidence.

The first reason, assigned by the appellees for not joining in demurrer, is, that they do not admit, that the testimony of James London was correctly taken down. But, if there were any error in it, the fault cannot be imputed to the appellant more than the appellees, as he was discharged by consent of *both parties*, and the want of recollection of the Judge ought not to prejudice the demandant. Besides, it is not shewn that the error complained of, would in any manner affect the decision of the cause.

Second objection. As the tenants would contend, upon the evidence offered by them, that the jury might infer a patent to some one of those under whom they claimed, the evidence ought not to be demurred to, unless the demandant would admit the fact, which it was the tendency of that evidence to prove, &c.

The answer to this objection has been given already. It was the province of the *Court*, and not the *jury*, to infer the existence of a *patent*. As the question belonged to the *Court*, and not the *jury*, the rule can have no application, that every inference, which the *jury* might draw, should be admitted by the demurrant.

Third objection. The evidence, offered by the demandant and the tenants, is conflicting.

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This objection admits of the same answer as the preceding. The difference between the witnesses is unimportant; and there is no ground for impeaching the credit or sufficiency of the demandant's evidence.

Fourth objection. This relates to the credit and sufficiency of the demandant's evidence, to prove that his patents cover the land in controversy.

As to the point stated in this objection, the parties are directly at issue, and it being a question for the Court, the tenants ought to have been compelled to join in demurrer.

The Court were right in admitting the record in ejectment in evidence, in this cause. It was a suit between the *same parties* and for the *same subject matter*. The rule is, that a record is proper evidence between those who are *parties* or *privies*. The facts found in that action, prove incontestibly that the possession of the tenants, and those under whom they claim, was by virtue of the patent of 1755, and of the judgment of the General Court, and cannot raise the presumption of any other patent.

Lastly, if the Court was right in refusing to compel the tenants to join in demurrer, they erred in refusing to grant the demandant a new trial. The verdict was clearly against evidence; and the objection made to the testimony of James London, if good, would only prove the propriety of affording the demandant an opportunity, to have his testimony taken again, under more favorable circumstances.

*Johnson and Wickham*, for the appellees.

The tenants have strictly obeyed the decision of the Special Court. They have not brought evidence to prove that the land was not waste and unappropriated, at the date of the patent in 1755, nor did they rely upon the instruction given by the Superior Court, on the first trial. They merely offered evidence of long possession in themselves,

1823. payments of quit-rents, &c., to lead to the presumption of a  
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It is said, that the Court erred in refusing to compel the tenants to join in demurrer to evidence. But, this decision may be supported, on many grounds.

1. Because the demurrer did not set forth *all* the evidence, which is decided to be necessary, in the case of *Hoyle v. Young*, 1 Wash. 150, in this Court. A portion of the evidence of *James London* is not contained in the demurrer.

It is objected, that the Judge did not decide what that evidence was. To this it may be answered, that it was not the duty of the Judge. It was a *matter of fact*. The practice of the Judges in England at *nisi prius*, to take notes of the evidence, does not exist in this Country. It is a mere *practice* not required by the general principles of law. *Here*, the witness is always appealed to in a question about his evidence; and the demandant, having consented to the discharge of the witness, cannot take advantage of his absence. The very consent of the demandant to the discharge of the witness, is a waiver of his right to demur.

2. Because the evidence was *circumstantial*, conducing to a *presumption* of the existence of a patent, and therefore proper for the consideration of a *jury*.

The proposition on the other side, that it was the province of the *Court*, is denied to be law. The case from Binney's Reports, 6 *Binney*, 419, is an extra-judicial opinion, and at variance with the decisions in Virginia. *Hardaway v. Manson*, 2 Munf. 230, and *Hollingsworth v. Dunbar*, 5 Munf. 199, prove, that a Court cannot *instruct* the jury as to the sufficiency of evidence. The true principle is, that the Court must decide, what evidence is proper to go to the jury to raise a presumption; but, when the evidence is admitted, the subject is under the entire control of the jury.

A demurrer to evidence is never proper, where there is any doubt as to the *facts*; but the party demurring must

admit all proper inferences from the facts. *Co. Lit.* 72, a; 5 *Co. Rep.* 104, *Baker's Case*. The case of *Cocksedge v. Evanshaw*, Doug. 119, decides, that the jury only can infer facts from facts or from evidence. To the same effect, are the cases of *Gibson & Johnson v. Hunter*, 2 H. Black. 187, and *Wright v. Pindar*, Allen's Rep. 18. No case can be found, where any fact remains in doubt, and a party is compelled to join in demurrer.

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This demurrer presents numerous questions of fact. 1. As to the point of *possession*, and whether that possession was *uninterrupted*. 2. Whether quit-rents were paid. 3. Under what *right* the tenants held; whether their possession was to be referred to the patent of 1755, 1775, or to *some other patent*. This was a question of fact to be left to the jury. 4. Whether the *entries* proved by the demandant, were made on the *land in controversy*. 5. Whether the land spoken of in the special verdict, was the same with that demanded in the suit. 6. Whether the demandant is the same *Reuben Norvell* to whom the patent issued. 7. Whether the demandant's patents covered the land in controversy. The *identity* of the land can only be proved by *admission*, or by an *actual survey*. *London's* evidence, stating his *belief*, was a question for the jury to weigh. 8. Whether the patent of 1755 was ever forfeited. 9. Whether a patent had ever issued to the tenants, or those under whom they claimed. This was a question for the jury; because, if they had found a continuing possession under the patent of 1755, of more than fifty years, the title of the tenants would be undoubted.

It may be objected, that the maxim of *nullum tempus* would render the possession of the tenants ineffectual against the Commonwealth. But, the first case of *Norvell v. Camm*, 2 Munf. 257, decides, that a possession of twenty years would avail in ejectment against the rights of the Commonwealth; and if so, a possession of fifty years must equally bar those rights in a *writ of right*. The *principle* is the same in both cases.

1823. A tenth reason is, that a jury might have *presumed* a  
 December. patent to *John Christian* and those under whom he claim-  
 Norvell ed. The principles of presumption are collated in *Phil-*  
 v. Camm. lips on Evidence, p. 124; see, also, 11 East, 488, *Good-*  
*title*, lessee of *Parker v. Baldwin*, and their application  
 to this case is direct. Courts have never fixed the *shortest*  
 time within which a patent shall be presumed. It de-  
 pends upon circumstances, and therefore proper for a jury.

This principle is fully decided in the case of *Archer &c.*  
*v. Saddler*, in this Court, 2 *Hen. & Munf.* 370. This  
 presumption ought to be favored in this country, where  
 titles are not as clear as in England; and the inclination of  
 the Legislature on this subject, is strongly indicated in the  
 general land law, 1 *Rev. Code*, 330.

The special verdict cannot be received in evidence; for,  
 it is a well established rule, that no matter of *record* can be  
 proved, except by the *record* itself, unless you lay a foun-  
 dation for the evidence, by proving the *loss* of the record.  
 But, here the *patent* is only proved by the verdict.

The judgment of the General Court gave the petitioners  
 an exclusive right to take out a *patent*, to which right there  
 was no limitation.

The portion of the demandant is uncertain, and there-  
 fore it would have been improper in the Court to compel  
 the tenants to join in the demurrer to evidence.

It is a rule, that the demurrant should admit all the *facts*  
 on which the opposite party relies; and all disputed facts  
 relied on by the demurrant, should be waived by him.  
 Otherwise, the Court cannot compel the party to join in  
 demurrer; for, the Court cannot settle controverted *facts*.  
 The case of *Hyers v. Wood*, 2 Call, 574, decides, that the  
 demurrant must admit every fact and conclusion which  
 such evidence may conduce to prove.

It is not yet clearly settled, whether these admissions  
 are to be made in the first instance, and stated in the de-  
 murrer itself, under the direction of the Court, or whether  
 the Court are to draw the proper inferences on the trial of

the demurrer. The first mode appears to be most correct. Judge *Roane*, in his opinion in the case of *Harrison v. Brock*, 1 Munf. 22, leaves the subject in doubt; while the case of *Stevens v. White*, 2 Wash. 203, does not militate against the doctrine.

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The motion for a new trial was properly over-ruled. The affidavit was insufficient; and, as *James London* had been dismissed by consent of parties, his absence was not a ground for a new trial.

*Stanard*, in reply. The question is, whether all the evidence of the tenants is not referable to the patent of 1755, and the judgment of the General Court. If it be, it cannot afford a presumption of any other patent. To ascertain this, the Court will look through the record, as was done in the case of *Tomlin v. How*, Gilm 1.

*Presumption* of acts of Parliament, patents, &c. is admitted as a *deduction of law*, on principles of policy, to protect long possessions. *Mayor of Kingston v. Horner*, Cowp. 102; *Archer v. Saddler*, 2 Hen. & Munf. 379, *Roane's* opinion; *Eskridge v. Cowper*, Cowp. 214; 11 East, 488. The cases cited to prove the opposite doctrine, will be found, upon examination, to fall short of the object. If the Court shall be satisfied, upon examination of the record, that the evidence is only to be referred to the patent of 1755, they ought not to have left it to the jury.

As to the practice in cases of demurrer to evidence, that suggested on the other side has never prevailed in this Country. The inconveniences of such a practice are infinite, and no one advantage recommends it. The case of *Pawling et al. v. United States*, 4 Cranch, 219, is an authority in my favor. As to the cases which say, that where evidence is *vague* and *contradictory*, a demurrer to evidence is not proper, the foundation fails in this case; because, I maintain, that the evidence is susceptible of a very clear construction. In the case of *Stephens v. White*, 2 Wash. 203, the evidence admitted of two constructions, and yet the demurrer was allowed.

1823. That the *Court*, and not the *jury*, are to presume a pa-  
*December* tent, is proved by the case of *Knight v. Halsey*, 2 Bos. &  
 Norvell Puller, 206; 2 Saund. 175, note, and many others. *Ri-*  
 v. card *v. Williams*, 7 Wheaton, 59, is to the same effect.  
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But, *possession* never is received as a ground to pre-  
 sume a *patent*, unless such possession is accompanied with  
 a *claim of title*. The right, which the tenants claim,  
 cannot be traced further back than the year 1774. All  
 prior right was extinguished by the judgment of the General  
 Court.

As to the *identity* of the land, it appears, by the *ad-*  
*mission of the tenants*, that *Norvell's* patent covers the  
 land in question. The special verdict finds that it is the same  
 land; and, as that verdict was between the *same parties*,  
 and for the *same matter in controversy*, it is clearly evi-  
 dence in this cause.

There can be no presumption of a patent, founded on a  
 possession of eighteen years. *Norvell's* patent was in  
 1797. The tenants' title commenced with the judgment  
 of the General Court in 1774. Take out five years during  
 the war, and it will reduce the possession of the tenants to  
 eighteen years or less.

The Judge ought to have compelled the tenants to join  
 in demurrer, although the evidence of *James London*  
 might have been uncertain, as to some points; unless the  
 importance of those points were shewn to the Court. The  
 tenants ought not to be prejudiced by the *forgetfulness* of  
 the Judge.

*London's* evidence proves, that the land in controversy  
 was covered by the patent.

As to the motion for a *new trial*, the Court are at liberty  
 to look at the evidence in the demurrer, to decide whether  
 the verdict was contrary to evidence; according to the  
 precedent in the case of *How v. Tomlin*, before referred  
 to. This case is free from the objection made in *Bennett*  
*v. Hardaway*, 6 Munf. 125, because the evidence here  
 was taken down from the mouths of the witnesses, but in  
 that case it was reduced to writing, after the trial.

December 5. Judge BROOKE, delivered the opinion of the Court.

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In deciding this case, the Court disclaims the power to change or limit the effect of the judgment of the Special Court of Appeals; nor would it countenance any evasion of it by the Court below, in permitting the evidence which is set out in the first bill of exceptions, to go to the jury. No attempt of the sort is perceived by the Court. That evidence is not exhibited to repel the patent of 1797, under which the demandant claims, as in the case before that Court; but, to sustain it against a new title attempted to be set up by the tenants, and was therefore rightfully permitted to go to the jury.

Upon the second bill of exceptions, the Court is of opinion, that the evidence offered by the tenants, in the first instance, and by the demandant to rebut it, made a proper case for a demurrer. The evidence of the demandant is consistent with that of the tenants, from the whole of which the conclusions of law would be more correctly drawn by the Court than the jury. The first objection by the tenants to joining in the demurrer, would deserve consideration, if the error complained of in taking the testimony of *James London*, the witness, had been stated, and it also appeared that it would affect any of the questions to be decided by the Court, on the demurrer; but, it not being so stated by the party taking the objection, though it is stated by the counsel for the demandant, that the difference between them was, whether the witness spoke of the sale being made, and the title claimed, by *John* and *Charles Christian*, or by *John* only. The Court is of opinion, that there is nothing in the objection.

As to the uncertainty in regard to the identity of the land in controversy; if the demandant is entitled to recover as much of the 493 acres, described in the count, as his patent for 669½ acres will include; the Court is of opinion, that it sufficiently designates that quantity, by metes and



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bounds, to enable the Court to identify it, upon the final decision of the cause. The remainder of the 433 acres described in the pleadings, and supposed to be covered by the patent of the demandant of 1813, the Court deems it unnecessary to notice in the present state of the cause.

The judgment is therefore reversed, and the cause remanded for further proceedings, in which the verdict is to be set aside, and the tenants compelled to join in demurrer, and, if necessary, a writ of enquiry of damages.*

Judges GREEN and SUMMERS, differed from the rest of the Court, as to the *form* in which the judgment was to be entered; and Judge GREEN, submitted the following, as conveying the ideas of himself and Judge SUMMERS: That there is error in the judgment and proceedings, in this; that the Superior Court of Law should have compelled the tenants to join in the demurrer to evidence, tendered by the demandant, stating the evidence of *James London*, in the particular in which the counsel of the parties differed, as the counsel of the tenants insisted it was. Therefore, it is considered that the judgment be reversed and annulled, the verdict of the jury set aside, and the cause remanded to the said Superior Court, for a new trial to be had therein.

Judgment *reversed*, and the cause *remanded*, in pursuance of the foregoing opinion of the Court.

* *Note.*—Judge BROOKE, remarked, that on the question, whether that portion of the 669½ acre patent which was supposed to be included as a part of the land described in the count, is sufficiently designated, to justify a judgment, under the act for reforming the method of proceeding in writs of right, (1 Rev. Code, p. 484,) he differed from the other Judges. He thought there was nothing in the pleadings to warrant it.

RICHARDSON v. CAREY and others.

1823.

December.

Under what circumstances, the *field notes* of a surveyor are proper evidence, that a particular piece of land is not included in a patent.

A witness is *competent*, if the record in the suit in which he testifies, cannot be given in evidence for or against him, in any future suit to which he may be a party.

The interest of a witness may be *released* by the party requiring his testimony, and his competency restored.

This suit was brought originally in the Chancery Court of *Staunton*, and thence removed to the Chancery Court of *Winchester*.

Richardson filed his bill stating, that in the year 1788, he purchased of a certain *J. D. Carey*, at that time residing in the State of *Maryland*, a certain tract of land in *Frederick* county, *Virginia*, granted to the said *J. D. Carey*, by a patent from Lord *Fairfax*, dated February, 1762, according to the metes and bounds therein particularized, supposed to contain 406 acres, for which he contracted to pay 517*l.* for the entire tract, whatever actual quantity there might be upon survey; as appears by an agreement in writing, annexed to the bill; that the same writing will shew, that the complainant has paid the purchase money: that the parties afterwards procured a survey to be made of the same land, to ascertain the actual quantity in the tract; upon which survey, by the mistake of the surveyor in running the lines, a considerable quantity of the land purchased as aforesaid, and embraced in the original grant, was not included in the said survey; and a deed executed to the complainant by the said *Carey*, according to the survey, omitted a part of the land included in the grant to *Carey*, and by him sold to the complainant: that this mistake was not discovered before the death of the said *Carey*; otherwise, the complainant has no doubt, that the said *Carey* would have corrected it, and conveyed to the complainant, all the lands according to the calls of the original grant: that a certain *Henry W. Baker*, in

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his own right, and the same *Henry* and *John Baker*, executors of *Henry Baker* deceased, are in possession of the land in question, under a grant from the Commonwealth, subsequent to the grant to *Carey* before-mentioned, the said *Baker* having procured the said grant, by fraudulently setting forth that the said land was vacant and unappropriated, well knowing that the same was embraced by the grant to *Carey*. He therefore prays that *James* and *George Carey*, heirs and legatees of *R. D. Carey* deceased, *Henry Baker* in his own right, and the said *Henry* and *John Baker*, executors of *Henry Baker* deceased, may be made defendants in this suit: that they may be compelled to convey to the complainant, the tract of land according to the calls of the patent to the said *Carey*; and that the defendant *Baker*, may deliver up possession in the said land, and account for the rents and profits of the same.

Annexed to the bill, is the receipt of *J. D. Carey* mentioned in the bill, dated *August* 14, 1788, for 517*l.*, it being in full for a tract of land which he sold to the said *Richardson*, lying on the head of *Opecken* Creek, &c. granted by Lord *Fairfax* to the said *J. D. Carey*, for 406 acres, &c.

An order of survey was made.

Henry W. Baker states, in his answer, that he does not admit the terms of the alledged contract between *John D. Carey* and the complainant; and therefore, he requires strict proof, not only of the receipt aforesaid, but of his title in every other respect: that he is informed that the said receipt and deed bear date on the same day; and if so, it seems very singular that the description of the land should be so variant; and indeed it creates some doubt of the correctness of the transaction. He contends that he is the owner of the land in dispute, and trusts that he shall be able to establish his right when the survey shall have been made in this cause, without which it would be very difficult, if not impossible, to explain his pretensions. He

further states, that he and those under whom he claims, have been in possession of the lands now claimed, at least 48 years; and he relies upon being able to prove a possession in those from whom his father claims, for more than 50 years before the issuing of the *subpœna* in this case. He, therefore, relies upon the act of limitations. He also submits the question, whether the Court has jurisdiction in this case, which he contends is nothing more than a *writ of right* brought in a Court of Equity.

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John Baker, one of the executors of *Henry Baker* deceased, filed his answer, stating, that he does not, in his character of *executor*, hold or claim title to any part of the land claimed by the plaintiff; and as he is not charged in the bill, as claiming any part of the said land, in any other character, he is advised that he need not answer further to the allegations of the said bill, &c.

Henry W. Baker, by an amended answer, denies the legality of the complainants' attempting to prove that the deed from *Carey* to him comprehends more land than it actually does convey; that in addition to the patent and deeds already produced, he relies upon a patent from Lord *Fairfax*, for 976 acres, and another from Lord *Fairfax's* office; the former having issued to *Isaac Perkins*, and the latter to *Charles Perkins*; that since he filed his former answer, he has discovered the field-notes of *Thomas Rutherford*, formerly Lord *Fairfax's* surveyor, by whom *John D. Carey's* survey, under which the complainant claims, as also, the survey of the 67 acre tract, under which the respondent claims, and *Moorfield's* survey, adjoining *Carey*, were all made; that *Carey's* survey appears to have been made April 3rd, 1761, and the two others, the next day; that *Samuel Merifield* and *John Lupton*, who owned an adjoining survey, were chain-men; and that the Rev. *John Hogg* and *Charles Perkins* were pilots on both days. These *field-notes* the respondent offered as evidence on his behalf, and prayed that copies of them might be received as evidence, when duly proved.

1823. The deposition of Col. *Van Rutherford* states, that the
December. *field-notes* were contained in a memorandum-book of his
 Richardson deceased father, *Thomas Rutherford*; and, he believes,
 v. were entirely in the hand-writing of the said *Thomas*
 Carey and others. *Rutherford*, (except some names written in and near the
 back of the said book;) that he found the note-book in
 question, among his father's papers after his death, and it
 was among his other field-notes for many years before his
 death.

The depositions of *Hamilton*, *Lupton*, *Perkins*, and
Baker, were taken to prove, that the lines and corners, by
 which the defendant claimed, were the true ones. The
 complainant objected to these depositions as incompetent;
 the two first, because they claim land by the same lines;
 the two last, because they were vendors, under whom the
 defendant claims. The defendant had released the wit-
 ness *Baker*.

James Beatty proves, that the boundaries, as asserted
 by the defendant, were those by which *Richardson* bought
 of *Carey*; and, that *Richardson* told him he bought of
Carey by the acre.

Hodgson and *Haymaker* prove the boundaries; and,
 that a line-fence was standing on the line claimed by *Ba-
 ker*, before *Richardson's* purchase of *Carey*, viz: as early
 as 1786.

The *field-notes*, authenticated by *Van Rutherford*, are
 in exact coincidence with the courses and distances of the
 patents, except in a single instance, where there is a small
 difference, evidently the effect of mistake in copying.

John McPherson proves, that he was present at the con-
 tract between *Richardson* and *Carey*, and he understood
 that *Richardson* was to have all the land the said *Carey*
 held under a patent, which was then produced; but, he has
 no recollection of the contents of the patent, except, that it
 was said to contain that tract of land, in quantity about 400
 acres.

The Chancellor dismissed the bill of the plaintiff, from
 which decree he appealed to this Court.

Wickham, for the appellant.

Tucker and Leigh, for the appellees.

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For the appellant, it was contended:

1. That the *field-notes* could not be received to contradict a survey. They are not, in fact, *field-notes*, but mere copies of the surveys made out by *Rutherford*. *Richardson* bought of *Carey* the whole tract.

2. *Perkins* and *Baker* were incompetent witnesses, because they were vendors, under whom the defendant claims.

For the appellees. The objections to *Hamilton*, *Lupton* and *Perkins*, as witnesses in this cause, are all answered by the case of *Baring v. Reeder*, 1 Hen. & Munf. 154, in which it is finally settled, that a witness is competent, unless he is interested in the event of the cause in which he is called to testify. As to the objection to *Baker*, his competency is restored by the release of all demand, by the vendee.

As to the *field-notes*, they were admissible evidence, as will appear from *Phillips's Evidence*, c. 7, § 7, p. 183-198, and the cases there cited. It is said, however, that they are not *field-notes*, but *copies of surveys*. But, a survey is always accompanied by a *plat*, which is not the case here.

The evidence of *Bartges* ought not to have been received, to prove *Carey's* signature to the receipt to *Richardson*, without proof of the hand-writing of the subscribing witness. *Peake's Evidence*, p. 97-100.

Again. *Perkins*, and those under whom he claimed, were in possession; and, therefore, the act against buying pretended titles, applies to the purchase by *Richardson* of *Carey*.

There can be no doubt, upon all the evidence taken together, that the patent to *Carey* did not embrace the land in question, and that, therefore, it was open to location by *Baker*.

1823. *December 8.* Judge BROOKE, delivered the opinion of
December. the Court:*

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The Court is of opinion, that the field-notes objected to in the argument, were proper evidence, under the circumstances of this case; and, that the evidence on the part of the appellees, excepted to by the appellant's ancestor, was competent evidence, under the authority of *Baring v. Reeder*, 1 Hen. & Munf. 154, and other cases in this Court. On the merits, the Court is of opinion, that the land in controversy was not included in the patent to *Carey*, under whom the appellant's ancestor claimed; and, that as to the boundary, the decree of the Chancellor is correct. For these reasons, without deciding any other question in the cause, the Court is of opinion, that there is no error in the said decree; therefore, it is decreed and ordered, that the same be affirmed, and that the appellants do pay unto the appellees their costs, &c.

* Judge CABELL absent from indisposition.

NEWMAN v. CHAPMAN.

1823.
December.

A subsequent purchaser will be affected with notice of a prior mortgage, although not recorded, if he has actual notice of the existence of such mortgage; and the fact of notice may be inferred from circumstances, as well as proved by direct evidence.

The doctrine of *lis pendens* does not rest upon the presumption of notice, but upon reasons of *public policy*; and, in cases in which it operates, applies where there is no possibility that the party should have notice of the pendency of the suit.

But, a subsequent purchaser, for valuable consideration, without actual notice, is not affected by a suit depending to foreclose a mortgage, not duly recorded. As to the rules which govern a *lis pendens*, see Judge GREEN's opinion in this case.

A power of attorney to sell lands, does not require, as between the parties, any particular mode of attestation; but may be proved in the same way that any other fact is proved. See Judge GREEN's opinion.

The assignee of a mortgage may maintain a suit to foreclose, without making his assignor a party, if the legal title has been conveyed to him.

A Court of Equity has always jurisdiction to carry its own decrees into effect. Neither a mortgagor nor his assignee can hold adverse possession to the mortgagee, unless the assignee had taken a conveyance without notice. Otherwise, they are mere tenants at will.

An account of rents and profits may be taken by a commissioner, as well as be ascertained by a jury; and the former is the most usual course.

Appeal from the Chancery Court of Fredericksburg.

George Chapman, jun. filed his bill stating, that a certain *John Armistead* of the county of *Caroline*, died in 1788, leaving a large estate in lands, negroes, and other property, which he devised to his children: that, his son *William Armistead* received the portion allotted to him, and gave a mortgage upon his land; which mortgage was afterwards assigned to a certain *Jesse Simms*: that the said *Simms* brought a suit in the Chancery Court of Richmond, to foreclose the said mortgage, and obtained a decree, by virtue of which the land was duly sold; the said *Simms* became the purchaser, and the Court confirmed the sale; whereby, he became the lawful proprietor in fee, of the said land and appurtenances, so far as the title of the said *William Armistead* was concerned; and the said

-1823. *Simms* was entitled to be put in possession of the same, subject only to the claims of such persons as should have right derived from any other person than the said *William*, or derived from him prior to the said mortgage or suit in Chancery to foreclose, as aforesaid : that the sale and conveyance of the commissioners was made on the 13th of July, 1804, and on the 13th of August in the same year the said *Jesse Simms* conveyed the said tract of land with its appurtenances to the complainant, in consideration of \$11,400, which the complainant had previously paid to the said *Jesse Simms*, he not supposing that any dispute could be raised concerning a title, acquired and confirmed by the authority of the Court of Chancery ; to which he is now obliged to apply for its further aid *to effectuate its own decree*: that a part of the said land, viz: about 593 acres, is in possession of *Thomas Newman* ; another part consisting of about acres is in possession of *Richard Newman* ; and the residue is still in possession of the said *William Armistead*: that, *Thomas and Richard Newman* have no other title or claim to the said land, *except that derived from the said William Armistead, subsequent to the institution of the said suit of Jesse Simms, and while it was pending in the said Superior Court of Chancery*: that the said *William Armistead* has been in the receipt of the profits of the lands in his possession, by which he has principally maintained his family, and has rendered no account thereof to the complainant : that the rents and profits of the portions of land in possession of the said *Thomas and Richard Newman*, have been received by them, in like manner, and no account rendered to the complainant : that all these persons refuse to deliver possession to the complainant of the said lands, and also refuse to account for the profits, according to their respective receipts and enjoyments: that no writ of *habere facias possessionem* was issued from the said Superior Court ; and the said *Jesse Simms* is dead, insolvent, and has no representative known to the complainant: that, in a case so

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complicated, the complainant is advised to apply to the Court of Chancery, *to carry into effect its own decree*, in such manner as shall be consistent with the just rights of all persons who do not claim title *from* or under the said *William Armistead*, since the pendency of the said suit of the said *Jesse Simms*, whose bill was filed on the 12th day of May, 1797; but, with regard to the said *William*, the complainant is advised that the said decree and proceedings of sale are final and conclusive. He therefore prays, that the said *Thomas* and *Richard Newman*, and *William Armistead*, may be made defendants to this bill;* that the decree aforesaid may be carried into effect, in favor of the complainant, against the said *William Armistead*, and all persons claiming under him, since the 12th day of May, in the year 1797, &c.

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Thomas Newman answered, that he had purchased of *William Armistead*, at different times, between the years 1793 and 1797, about 326 acres of land, out of the tract in the bill mentioned; that the deeds will fully shew, at what time the purchases of the said land were made, except as to 47 acres, which were purchased in October, 1793; but, that the defendant did not get a conveyance from the said *William Armistead*, until the month of July, 1797, at or about which time he purchased a further quantity of 104 acres, and both purchases were included in the same deed; that the defendant *never knew any thing of the existence of the suit in Chancery for the sale of the lands in the bill mentioned, until long after he had completed his purchases of the aforesaid lands of William Armistead*; nor had he ever seen any thing of the mortgage in the bill mentioned; nor did he know that any such mortgage existed, until he had completed those purchases and obtained his deeds; that the defendant also purchased of *John B. Armistead*, who had, before that time, purchased of *William Armistead*, about 513 acres of the same tract

* There were other defendants, whom it is not important to mention.

1823. of land, on or about the month of *April* or *May*, 1800,
December. but did not get a conveyance for the same, until the month
 of *April*, 1801; that at the sale by the commissioners, the
Newman defendant attended with his deeds, and forbade the sale, as
 v. it would be illegal, and the title was in him. He therefore
Chapman. charges, that the complainant, before he purchased of
Simms, was fully apprised of the title of the defendant.

Richard Newman stated in his answer, that, as to the transactions between *William Armistead* and *Abraham Morehouse*, and the mortgage of land to him by the said *Armistead*, he had heard nothing, until several years after he had purchased of *William Armistead* 163 acres of land, at 40 shillings per acre, and had the deed for the same recorded in the County Court of Prince William, which record was made in October, 1793; and, when he did hear that such a mortgage was in existence, he also heard that it had not been recorded in due time to give it validity against the claim of a third person. He, therefore, hopes, that his title to the lands purchased of *William Armistead*, may not be affected by any decision relative to the said mortgage, &c.

The deed of mortgage from *William Armistead* and wife to *Abraham Morehouse*, was dated on the 3rd day of December, in the year 1794; which mortgage was assigned by *David Allison*, as attorney for the said *Morehouse*, to the said *Simms*, by virtue of a power of attorney, which was attested by only two witnesses.

A deed from *William Armistead* and *Nancy*, his wife, and *John B. Armistead* to *Thomas Newman*, conveying 151 acres, is dated on the 11th day of September, 1797.

A deed from *William Armistead* to *Thomas Newman*, dated the 26th day of September, 1793, for 175 acres.

The bill to foreclose, brought by *Jesse Simms* against *William Armistead*, was filed on the 12th day of May, 1797.

The deed made by the commissioners for the sale of the land, under a decree of the Court, to *Jesse Simms*, is dated on the 13th day of July, 1804.

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The deed from *Jesse Simms* to *George Chapman*, the plaintiff, conveying the tract of land on which *William Armistead* then lived, containing 1140 acres, more or less, being the same that the said *Armistead* conveyed to *Abraham Morehouse*, by deed of mortgage, dated the 3rd of December, 1794, and by the said *Morehouse* assigned to the said *Jesse Simms*.

The mortgage from *Armistead* to *Morehouse* was not recorded within the time prescribed by law.

The deed from *William Armistead* to *Richard Newman*, conveying 163 acres, is dated the 27th day of September, 1793.

William Armistead never answered the bill.

The Chancellor decreed, that *William Armistead* and *Thomas Newman* should severally deliver up to the plaintiff, possession of all the lands held by them, mentioned in the deed of mortgage between *Armistead* and *Morehouse*, except 175 acres described in the deed of the 26th of September, 1793, between the said *Armistead* and *Thomas Newman*; and, that one of the commissioners of the Court should make up an account of the rents and profits of the lands so directed to be given up, from the 9th day of August, 1804.

Thomas Newman appealed to this Court.

Stanard, for the appellant.

The question is, whether the mortgage to *Morehouse* was valid against *Thomas Newman*, the purchaser from *William Armistead*? I contend that it is void; because, whatever notice *Newman* may have received of the existence of the mortgage, *if it was not recorded*, he might have purchased with impunity. This doctrine is derived from a just construction of the act of Assembly, relative to

1829. conveyances. The act in the *Revised Code*, p. 157, § 4,
December. (old edition,) declares, that all *mortgages whatsoever*
Newman shall be void as to “*all creditors and subsequent purcha-*
v. *Chapman.* *sers, unless they shall be acknowledged, or proved, and*
recorded according to the directions of this act.” In
 this respect, it differs from the first section of the same act,
 which declares, that, as to the conveyances therein men-
 tioned, such conveyances shall be void against *subsequent*
purchasers, &c. not having notice thereof, &c. The omis-
 sion of this last expression, in the 4th clause above men-
 tioned, clearly indicate the intention of the Legislature,
 that no *mortgage* should be good against a subsequent pur-
 chaser, unless it is *duly recorded*.

But, if notice of a previous conveyance will affect a
 subsequent purchaser, it must be notice *direct* and *per-*
sonal, not *implied*. Lord REDESDALE, in the case of
Underwood v. Lord Courtown, 2 Sch. & Lefr. 66, gives
 a definition of constructive notice, in conformity with these
 ideas. A *lis pendens* is not a sufficient notice. The suit
 to foreclose was brought by *Simms* against *Armistead*.
Morehouse was not a party. It does not, therefore, bind
 upon the rights of *Morehouse*, and, consequently, cannot
 bind the rights of *Newman*. This defect could not be
 cured by an amendment of the bill; for, a Court of Equi-
 ty will not allow a party to amend his bill, to the injury of
 a fair purchaser. *Sorrell v. Williams*, 2 P. Will. 482.
 But, it was not a *lis pendens* so as to affect *Newman*, for
 another reason. He purchased a part of the land in 1793.
 A *lis pendens* does not exist until the *subpoena* is served.
 1 *Vern.* 318, *Anon.*; *Sugd.* 536. The first process was
 not executed until 1797.

But, this is a case for a Court of Law, and not a Court
 of Equity. Although the rights of the appellee are deri-
 ved under the decree of a Court of Equity, yet he is only
 a purchaser from a purchaser under that decree. The pro-
 ceedings in equity are no longer in *fieri*. They only
 make a part of the muniments of title.

Another objection is, that the deed under which the plaintiff claims, passed no title, as the property was then in the adverse possession of *Newman*. This principle is established by the cases of *Tabb v. Baird*, 3 Call, 475; *Hall v. Hall*, 3 Call, 488; and *Clay v. White*, 1 Munf 162. 1823. December. Newman v. Chapman.

There is error also in the decree, in requiring an account of rents and profits to be taken by a commissioner, instead of referring that subject to a jury.

Wickham, for the appellee.

As to Mr. *Stanard's* position, that no notice will affect a subsequent purchaser, if the deed is not recorded; the 1st and 4th section of the act are to be taken together, as being in *pari materia*, and applying, in all points, to the several particulars contained in each. The consequences of notice, therefore, will be equally as applicable to the 4th as to the 1st section. But, *Newman* does not alledge that he has paid the purchase money. His deed, too, was not duly recorded; because, one of the subscribing witnesses proved it after the eight months had expired. The subpoena was duly executed, before September, 1797, when *Newman* made his purchase. It was not necessary to make *Morehouse* a party; no decree could be obtained against him. As to jurisdiction, it was proper for *Chapman* to come into a Court of Equity, as a Court of Law might not pay a proper respect to a *lis pendens* in equity. There is no plea to the jurisdiction. This suit, too, was only for the purpose of enforcing a previous decree of the Court of Chancery; a power which every Court must possess.

The objection to *Chapman's* want of title is without foundation, because he was invested with *Morehouse's* legal estate; and *Armistead*, and those deriving under him, were mere tenants at will.

It is usual and proper for a commissioner to make up an account of rents and profits.

1823. December 6. Judge GREEN, delivered the following opinion:

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The object of the statute requiring mortgages to be recorded, and declaring that, if not recorded as the statute prescribes, they shall be void as to creditors and subsequent purchasers, was to prevent, by affording the means of ascertaining the existence of the incumbrance, the frauds which might otherwise be practised by the mortgagor and mortgagee, on creditors and subsequent purchasers, by concealing it. If a purchaser has actual notice otherwise, of the existence of the mortgage, he is not only not prejudiced by the failure to record it, but is himself guilty of a fraud in attempting to avail himself of the letter of the statute, to the prejudice of another who has a just claim against the property. The statute, indeed, vests in the subsequent purchaser, in that case, the legal title; yet, although the legal title of the mortgagee is divested by the subsequent conveyance, his *equitable right* to subject the property to the payment of the debt, remains; not only because the mortgage is good between the parties; but, even if void as a conveyance between the parties, it would still be evidence of an agreement between them, and a Court of Equity will give effect to the equity of the mortgagee, by holding the subsequent purchaser to be a trustee. Upon these principles, the Court of Chancery in England has always relieved a prior purchaser, whose deed has not been registered, against a subsequent purchaser with notice.

I had at one time great doubts, whether the principle of those decisions did not apply to the case of a *lis pendens*. Lord HARDWICKE, in the leading case of *Le Neve v. Le Neve*, 3 Atk. 646, declared, that the statutes of registry in England (which, as to the matter under consideration, are the same in effect as our statute,) only vested the legal title in the subsequent purchaser, and left the case "open to all equity;" and, in that case, he relieved against a sub-

sequent purchaser, upon *constructive*, and not *actual* notice, the notice being to an agent of the purchaser. A *lis pendens* has always been spoken of in the English Court of Chancery, as a constructive notice to all the world; as all men are bound and presumed to take notice of the proceedings of a Court of Justice. If these propositions were universally true, it would seem to follow, that a *lis pendens* purchaser was a purchaser with notice, and would take the property subject to the claims of the plaintiff in the suit, as the defendant held it. In all questions of fact, the existence of the matter in question may be proved by direct evidence, or by the proof of other facts, from which it may justly be inferred, that the fact in question does exist. A fact thus proved by circumstantial evidence, is taken to exist for all purposes, as if it were proved by direct evidence. I cannot, therefore, feel the force of the observation frequently thrown out in modern cases, that a notice to affect a subsequent purchaser, after an unregistered deed, must be *actual*, and such as to affect his conscience, and not *constructive*. A notice, proved by circumstances to exist, affects the conscience of the party as much as if proved by direct evidence. In all other cases, a purchaser of a legal estate, with notice of a subsisting equity, is bound by *constructive*, as well as by *actual*, notice; and *that*, because his conscience is affected, and he is guilty of a fraud. Without fraud on his part, his legal title ought to prevail. I see no reason why a difference should be made, between the case of a purchaser after an unregistered deed, and a purchaser of a legal title, subject to any other equity, as to the proof of the notice which ought to be held to bind them. This distinction between an *actual* and *constructive* notice, in the case of a purchaser after an unregistered deed, seems to have proceeded from a doubt, whether the relief given in the early cases upon that subject, had not been in opposition to the spirit and policy, as well as the letter, of the statutes of registry.

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The rule, as to the effect of a *lis pendens*, is founded upon the necessity of such a rule, to give effect to the proceedings of Courts of Justice. Without it, the administration of justice might, in all cases, be frustrated by successive alienations of the property, which was the object of litigation, pending the suit, so that every judgment and decree would be rendered abortive, where the recovery of specific property was the object. This necessity is so obvious, that there was no occasion to resort to the presumption, that the purchaser really had, or by enquiry might have had, notice of the pendency of the suit, to justify the existence of the rule. In fact, it applied in cases in which there was a physical impossibility that the purchaser could know, with any possible diligence on his part, of the existence of the suit, unless all contracts were made in the office from which the writ issued, and on the last moment of the day. For, at common law, the writ was pending from the first moment of the day on which it was issued and bore *teste*; and a purchaser, on or after that day, held the property subject to the execution upon the judgment in that suit as the defendant would have held it, if no alienation had been made. The Court of Chancery adopted the rule, in analogy to the common law; but, relaxed, in some degree, the severity of the common law. For, no *lis pendens* existed until the service of the *subpœna* and bill filed; but, it existed from the service of the *subpœna*, although the bill were not filed until long after; so that a purchaser, after service of the *subpœna* and before the bill was filed, would, after the filing of the bill, be deemed to be a *lite pendente* purchaser, and as such, be bound by the proceedings in the suit, although the *subpœna* gave him no information as to the subject of the suit. A *subpœna* might be served the very day on which it was sued out, and there is an instance in the English books of a purchaser who purchased on the day that the *subpœna* was served, without actual notice, and who lost his purchase by force of this rule of law. This principle, however necessary, was harsh

in its effects upon *bona fide* purchasers, and was confined in its operation to the extent of the policy on which it was founded; that is, to the giving full effect to the judgment or decree which might be rendered in the suit depending at the time of the purchase. As a proof of this, if the suit was not prosecuted with effect, as if a suit at law was discontinued, or the plaintiff suffered a non-suit, or if a suit in Chancery was dismissed for want of prosecution, or for any other cause not upon the merits, or if at law or in Chancery a suit abated; although, in all these cases, the plaintiff, or his proper representative might bring a new suit for the same cause, he must make the one who purchased pending the former suit, a party; and, in this new suit, such purchaser would not be at all affected by the pendency of the former suit, at the time of his purchase. In the case of an abatement, however, the original suit might be continued in Chancery, by revivor, or at law, in real actions, abated by the death of a party, by *journeys accounts*, and the purchaser still be bound by the final judgment or decree. If a suit be brought against the heir, upon the obligation of his ancestor binding his heirs, and he alienates the land descended, pending the writ, upon a judgment in that suit, the lands in the hands of the purchaser would be liable to be extended; in satisfaction of the debt. But, if that suit were discontinued, abated, or the plaintiff suffered a non-suit, in a new action for the same cause, the purchaser would not be affected by the pendency of the former suit at the time of his purchase; and, if he could be reached at law, in equity it could only be, upon proof of actual notice and fraud. If a *lis pendens* was notice *then*, as a notice at or before the purchase would, in other cases, bind the purchaser in any suit in equity, prosecuted at any time thereafter, to assert the right of which he had notice, would bind the purchaser, so ought the *lis pendens* to bind him in any subsequent suit prosecuted for the same cause; but it does not. Again; a bill of discovery, or to perpetuate the testimony of witnesses, ought,

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if all persons were bound to take notice of what is going on in a Court of Justice, to be a notice to all the world, as much as a bill for relief. But, these are decided to be no notice to any purpose; a proof that the rule, as to the effect of a *lis pendens*, is one of mere policy, confined in its operation strictly to the purposes for which it was adopted; that is, to give effect to the judgments and decrees of Courts of Justice, and that it is not *properly* a notice to any purpose whatsoever. The English Judges and elementary writers have carelessly called it a notice, because, in one single case, that of a suit prosecuted to decree or judgment, it had the same effect upon the interests of the purchaser, as a notice had, though for a different reason. But, the Courts have not, in any case, given it the real force and effect of a notice.

I think that the statute over-rules this principle of law, in the case of a *lite pendente* purchaser, after an unrecorded mortgage. The decisions in the cases of notice, are according to the policy and spirit of the statutes; since, in those cases, the purchaser has the very benefit which the law intended to provide for him, and he is chargeable with *mala fides*, in attempting to acquire that to which he knows another has a just right. He cannot complain, that the mortgagee has done him an injury by his default in failing to record his mortgage, as the law requires. But, if the purchaser were held to be affected by the pendency of a suit, if he had not actual notice, he would suffer an injury by the default of the mortgagee, unless it were held to be his duty to enquire if any suit were depending, when he had no reason to suspect that there was any defect in the title. I think, that to require him to look to any other source of information than that which the statute has provided for him, would be contrary to the spirit and policy, and letter of the statute.

It follows, that the decree is erroneous, as it respects the 151 acres conveyed to the appellant in September, 1797; but, as to the 513 acres, which the appellant states

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in his answer that he purchased in 1800, he is not protected by the statute. He admits, that he came into the possession *pendente lite*. He does not deny notice of the mortgage, if that fact be material, upon the pleadings in this cause; and he does not shew that he was a purchaser, and that a conveyance was made to him. As to this, then, the decree ought to be affirmed, unless the other objections made at the bar ought to prevail. These are, that the suit was not so instituted as to attach on *Morehouse's* title under the mortgage, he not being a party, and there being no evidence that his title was in the plaintiff in that suit; that a Court of Equity has no jurisdiction, as the plaintiff, if he has a right, has a legal remedy; that the deed under which the plaintiff claims, passed no title, as the property was then in the adverse possession of another; and, that the rents and profits should be ascertained by a jury, and not by a commissioner.

If the rule be, that a purchaser, pending the suit, is bound by the decree in the suit as the defendant is bound, then it is too late now to urge the first of these objections. It might, possibly, have been urged by *Armistead*, whilst the suit was depending. But, failing to do so, he was bound by the decree, whether it were right or wrong. I think, however, that the objection could not have been relied on with effect, in the original suit. The power of attorney, by authorising the attorney to dispose of the mortgage, for and in the name of *Morehouse*, authorised him to convey the legal title, and that was the effect of the deed to *Simms*. The power of attorney being attested by only two witnesses, was not, for that cause, defective. The law does not require any particular form, as to the attestation of a power of attorney to convey land: as, between the parties, such a power may be proved by any evidence, which would be sufficient to prove any other fact in a Court of Justice. A Court of Equity always has jurisdiction to carry into effect its own decrees. In this case, a bill for that purpose was necessary; as well, because

1893. another party, not appearing as a party on the record, had
 December. become interested, as on account of the death of *Simms*.
 Newman The decree had never been executed. If there had been
 v. no change of the interest, and *Simms* had lived, the decree
 Chapman. might have been executed, and *Simms* let into possession
 by the ordinary proceedings in the Court for that purpose.
 After the decree was so executed, if *Simms*, or his as-
 signee, had been ousted or disturbed, he or his assignee
 would have been bound to proceed at law. The Court of
 Chancery was not *functus officio*, until the decree was
 executed by the delivery of possession.

I do not think, that *Armistead* could hold a possession
 adverse to *Morehouse* or his assignee, and consequently
 the conveyances of *Morehouse* and *Simms* passed the ti-
 tle they professed to pass, unless the sale to *Newman*
 varied the case; but, that sale being made pending the
 suit, *Newman* could no more hold an adversary posses-
 sion, unless he had taken a conveyance without notice,
 than *Armistead* himself could. *Armistead* was a tenant
 at will, and so was *Newman*, standing in his place.

The account of rents and profits might as well be taken
 by a commissioner, as ascertained by a jury; and the former
 is the most usual course.*

Judge COALTER. I am of opinion, that the Chancellor
 erred in his decree, in directing the appellant to deliver
 possession of the tract of 151 acres, conveyed by *William*

* The following were the cases referred to by Judge GREEN, in the course
 of his opinion: *Durbaine v. Knight*, 1 Vern. 318; *Preston v. Tubbis*, *Ibid.*
 286; 15 Vin. Abr. 128, pl. 2; *Birch v. Wade*, Ves. & Beam. 200; *Murray*
v. Ballou, 1 Johns. Ch. Cas.; *Littleberry's Case*, 5 Rep. 476; Cro. James, 340;
 2 Eq. Ca. Abr. 482; *Ib.* 685; 3 Ves. 485; 1 Eq. Ca. Abr. 358; *Bennet v.*
Batchelor, 1 Ves. jun. 64; *Habergham v. Vincent*, *Ibid.* 68; 3 Atk. 248;
Shannon v. Bradstreet, 1 Sch. and Lefr. 66; *Brace v. Duchess of Marlbo-*
rough, 2 P. W. 491; 2 Vent. 337; *Brotherton v. Hatt*, 3 Vern. 574; 2 Eq.
 Ca. Abr. 594; Bac. Abr. tit. *Fraud*, letter C; *Gooch's Case*, 5 Co. Rep. 80;
 1 Fomb. Eq. 279; *Curtis v. Perry*, 6 Ves. 745; *Davis v. Earl of Strathmore*,
 16 Ves. 419; *Wyatt v. Barwell*, 19 Ves. 439.

Armistead to him, on the 11th of September, 1797, by the deed of lease and release in the record, of that date. 1833.
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The bill claims to set up a mortgage, executed by the aforesaid *William Armistead*, of anterior date to the above conveyance; but which was never recorded, purely on the ground, that at the time of the purchase by the appellant, there was a suit pending to foreclose the mortgage. Newman
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If the act of Assembly in regard to mortgages not recorded, and which was in force at the time this bill was filed, is to be construed in connection with the previous clause in relation to other conveyances, so as to transpose the words from the one to the other, in relation to notice, and thus to make the law precisely what it now is, under the act of 1819; let us enquire how the appellee would have stood in a Court of Law, on a special verdict, finding simply the mortgage and subsequent conveyance, and a suit pending to foreclose the mortgage at the time of the conveyance?

The case for him would rest on an unrecorded mortgage against a subsequent conveyance, and which is expressly declared by the act to be void as to such subsequent purchaser, *not having notice thereof*. What sort of notice? Undoubtedly, such as would affect the conscience of the purchaser; otherwise, the act would be no safeguard to the innocent, as it was intended to be. A mere *lis pendens* is not such notice as that. This has been decided, as will be seen in a case mentioned in a note to the case of *Le Neve v. Le Neve*; and, also, as I am told, in a late case which I have not examined, reported in 19 *Vesey*. A Court of Law could not substitute any other kind of notice for that contemplated by the act. But, if the party has ground for coming into equity, that Court, too, I presume, must follow the law.

But if, previous to the act of 1819, the mortgagee of an unrecorded mortgage stood, as against a subsequent purchaser, as he did in England under the registry acts, (and I incline to think he did,) then his only remedy was in

1823. equity; and there he can only prevail on the ground of
December. fraud, or such notice as would affect the conscience of the
 purchaser, and which was, therefore, considered a fraud;
Newman and it has been decided as aforesaid, and, I think, correctly,
v. that a mere *lis pendens* did not affect the conscience.
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Suppose, in this case, the appellant had not denied notice, no charge of notice being in the bill, but had simply answered, that he had purchased for value, and got his deed, exhibiting it with his answer, and had demurred to the residue of the bill. Could the appellee have succeeded? I apprehend not. Or, would not such an answer have been a full response to the bill, no fraud or notice being charged, and sufficient of itself to defeat the claim of the appellee? I am much inclined to think it would; and, therefore, had the appellant exhibited a deed from *William Armistead* to *John B. Armistead*, and from the latter to him for the 513 acres mentioned in the argument, although there is no denial of notice as to it, I should, as at present advised, have thought that the appellee could not have recovered that tract, without amending his bill, and putting the fact of notice or fraud in issue; so as to give the appellant an opportunity of answering thereto. It is, however, not necessary to decide this point, because the appellant does not shew himself to be a subsequent purchaser of that tract, and it is only against such that the mortgage is void.

Whether, as this is an interlocutory decree, he may hereafter be permitted to file those documents, if they exist, is not for me to know or anticipate. On the record, now before the Court, the decree must be reversed as to the 151 acres, and affirmed as to the residue.

Judge BROOKE, concurred: and a decree was entered conformable to the foregoing principles.*

* Judge CABELL absent from indisposition.

DOUGLASS v. McCHESNEY.

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A tacit understanding between borrower and lender, founded on a known practice of the latter, to lend money at legal interest, if the borrower purchased of him a horse, at an unreasonable price, is a shift to evade the statute against usury.

Where a Court of Chancery has doubts, whether the sale of the horse or other property, is really intended as a shift to evade the statute against usury, it ought to direct an issue to be tried upon *visa voce* testimony, if to be had.

This was an appeal from the Staunton Chancery Court. The case was this:

Douglass borrowed \$500 of *McChesney*. About the same time *McChesney* sold him a horse at \$400, and took a deed of trust on real and personal estate to secure both debts. As soon as the money became due, *McChesney* advertised the property for sale.

Douglass thereupon filed a bill of injunction, stating, that in consequence of being pressed for money, he applied to *McChesney* for a loan of \$500; that *McChesney* replied, that it was his practice, whenever he lent money, always to sell a horse; that the complainant expressed his willingness to take a horse, but *McChesney* did not then shew him one, nor say any thing about the price; that some time afterwards, the complainant went, by appointment, to the house of *McChesney*, when the latter shewed him a horse, for which he asked the price of \$400, saying at the same time, that he had sold a horse to one of the complainant's neighbours, at the same price; that this neighbour, the complainant believes, was *David Cunningham*, to whom *McChesney* had lent money at the time of selling him the horse; that although the complainant had no objection to purchase a good work-horse at a fair price, he at once perceived that the horse offered him was not worth any thing like the sum of \$400, and that his value did not exceed from 80 to \$100, which must have been known to *McChesney*, who is a good judge of such property; that the complainant, urged by his neces-

1823. sities, and knowing that there was no chance of getting the
December. \$500 from *McChesney*, without giving him his own price
 ~~~~~ for the horse, was compelled to assent to this oppressive  
*Douglas* condition; that *McChesney* required a deed of trust on the  
*v.* complainant's farm, containing 142 acres, with considera-  
*McChes-* ble improvements, to secure both the \$500 and \$400 afore-  
*ney.* said; that afterwards, *McChesney* required the complainant  
 to include in the deed of trust, sundry slaves; to all which,  
 the complainant, impelled by the same necessity, consented,  
 and the deed was accordingly executed, as *McChesney*  
 wished; that *McChesney* also took two bonds for the two  
 sums above-mentioned, payable twelve months after date,  
 and the bond for \$500 bearing interest from its date; that,  
 on the very day that the time limited in the trust deed  
 expired, *McChesney* applied for the money, and, the com-  
 plainant not being able to make payment, he advertised  
 the property. He therefore prayed, that the sale might  
 be enjoined, and that *McChesney* and *Clarke*, (the trustee,)  
 might be made defendants to the bill.

The injunction was granted.

The answer of *McChesney* denied all the material allegations of the bill. He admitted, that he lent \$500 to the complainant, and sold him a horse for \$400, and that the latter executed a deed of trust to cover both sums; but denied, that there was any kind of usury in the transaction, and affirmed, that the sale of the horse and the loan of money were not connected in any manner whatever; that the proposition for the sale of the horse came from the complainant himself; that the complainant came by appointment to the defendant's house, saw the horse, and gave his bond for \$400, on twelve months credit, with a deed of trust to secure the payment; that before the deed was executed, (but after the horse had been delivered and the note aforesaid given,) the complainant proposed to borrow of the defendant \$500, promising to include this sum also, in the deed of trust, and to add three slaves to the real property, to be conveyed by the deed; that nothing was said

about the interest; but, the defendant took it for granted, that the loan was to be at lawful interest from the date, and with this understanding he agreed to lend the complainant the sum of \$500; that accordingly the money was actually lent, and a deed of trust executed to secure both debts; that nothing was said by either party, during the negotiation for the horse, about the loan of money, nor was any thing said on that subject, until after the sale of the horse was complete, the bond for the purchase money executed, and the horse delivered; that the horse was a very fine horse, about five years old; that the reason why he so promptly advertised the property was, that he was induced to believe, from the conduct of the complainant, that he did not mean to pay the debt.

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Sundry depositions were taken, which prove nothing material to the present controversy, except that the horse was not worth more than eighty or one hundred dollars cash, and that it was reported to be *McChesney's* practice, when he lent money, to sell a horse at an exorbitant price, to cover an usurious gain; but, there was no evidence to prove, that in this particular transaction the loan was connected with the sale, although some of the witnesses give it as their *opinion*, that the two contracts were so connected.

The Chancellor, on motion, dissolved the injunction, and the complainant appealed to this Court.

*Stanard*, for the appellant, made two points:

1. That the evidence, by fair deduction, proves the case as it is stated in the bill, and that usury, the most gross, was practised by *McChesney*. Even, if usury is not established, the exorbitancy of the contract for the sale of the horse, proves a degree of oppression which ought to be relieved against in a Court of Equity. The case of *Cole v. Gilbourn*, 3 P. Will. 290, is an authority for this principle.

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ney.

2. That the Court of Chancery ought, at least, to have directed an issue, to try whether the sale of the horse was intended as a shift to evade the statute against usury.

*Johnson*, for the appellee.

The bill is unsupported by the evidence, while the answer denies every charge. It must, therefore, be considered as true, there being no testimony to contradict it. The witnesses do not even identify the horse. It is of no importance, that the two bonds, (which are of different dates,) are covered by the *same security*. The solemn affirmation of the defendant, on oath, that they are totally distinct, must prevail over the assertions of the plaintiff in his bill, unsupported by evidence. In *Greenhow v. Harris*, 6 Munf. 448, Judge *Roane* declares, that Courts of Justice ought only to be governed by *judicial proof*, and not by their private opinions.

An issue is only proper, where there is *conflicting evidence*, not to enable a party to look for *further evidence*. Here, there is no conflict in the testimony. All that can be said is, that there is an *absence* of evidence to support the plaintiff's claim.

As to the exorbitancy in the price of the horse, that alone is never held sufficient to set aside a contract, unless some fraud or undue means are used to draw a party into the contract. *Sugd.* 192.

*December* 10. Judge *Brooke*, delivered the opinion of the Court.

The Court is of opinion, that a tacit understanding between the parties, founded on a known practice of the appellee, to lend money at legal interest, if the borrower purchased of him a horse, at an unreasonable price, would be a shift to evade the statute against usury. Whether the transaction under the consideration of the Court, was of

that character or not, the Court is not entirely satisfied by the testimony in the record; and, is of opinion, that an opportunity ought to be afforded the appellant, (of which he has been deprived by executing the deed of trust,) to submit the facts alledged in his bill, to a jury, who will be more competent to decide them on the *viva voce* testimony of the witnesses, (if to be had,) than the Chancellor or this Court, on the depositions in the cause, and that the said decree is erroneous; therefore, it is decreed and ordered, that the same be reversed and annulled, &c. And it is ordered, that the cause be remanded to the said Court of Chancery, with directions to that Court to have an issue made up and tried, to ascertain the value of the horse at the time of the sale of the same to the appellant; whether he was or was not influenced in agreeing to give the price of four hundred dollars for said horse, by the expectation of a loan of money; and whether the purchase of the horse at that price, was or was not, an inducement to the appellee to lend the five hundred dollars to the appellant, at legal interest; and that the cause be further proceeded in, according to the principles of this decree.

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## LEWIS'S Administrator v. WYATT.

A sheriff levies a *feri facias* upon property in possession of the defendant. An action of trespass is then brought against the sheriff, by the executors of the defendant's testator, on the ground, that the legal title to the property is in them, and not in the defendant, as they held the property under the will of their testator, and had never given their assent to the legacy to the defendant, who was residuary legatee of their testator. The jury give vindictive damages against the sheriff. In such case, a Court of Equity will enjoin the judgment in trespass, if it appears that the executors of the testator had only a *legal* title, without any *beneficial* interest in the property, the debts and legacies of their testator having been all paid. It would be against conscience, that the debtor should pay his debt, and at the same time recover damages against his creditor, on the distinction, that he held only the *beneficial* interest, and not the *legal* title, to the property taken in execution.

*John Ellis* and *Mary* his wife, having obtained a decree in Chancery against *John Lewis*, executor of *Warner Lewis*, the younger, and others, for the sum of 726*l.* 8*s.* with interest at the rate of 5 *per cent.* on 699*l.* 3*s.* 7*d.* from the 1st of January, 1801, sued out a writ of *feri facias* to enforce the decree. The said execution was put into the hands of a certain *Samuel Anderson*, deputy of *Peter Wyatt*, sheriff of the county of *Gloucester*. The said *Anderson* levied the execution upon sundry slaves, and other personal property, found at *Warner Hall*, the place of residence of the said *Warner Lewis*, the younger, during his life; all which property was then in the possession of the said *John Lewis*, his executor. The property, thus taken, was duly advertised according to law. When the day of sale arrived, and the said *Anderson* was about to sell the same, he was forbidden to do so, by *Philip L. Grymes*, and others, surviving executors of *Warner Lewis*, the elder, deceased, the father of the said *Warner Lewis*, the younger, deceased. The executors of the elder *Warner Lewis* claimed the said property, as being part of the estate of their testator, and belonging to them, as executors; they never having divested themselves of their rights, by any assent or surrender of the property.

In consequence of this interference, the sale was stopped, until *John Ellis* executed a bond of indemnification to *Peter Wyatt*, the high sheriff. The said *Anderson* then proceeded with the sale, and completed it. Soon after, an action of trespass was instituted by *Philip L. Grymes*, and others, surviving executors of the said *Warner Lewis*, the elder, against *Peter Wyatt*, for the seizure and sale aforesaid; and a verdict was obtained for \$5,000. The defendant then moved for a new trial, but the motion was over-ruled, and judgment rendered for the amount of the verdict.

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*Peter Wyatt* and *John Ellis*, filed a bill in the Chancery Court of *Williamsburg*, praying an injunction to the said judgment, stating the foregoing facts, and urging reasons why the said verdict ought not to be permitted to stand. These reasons, are: 1st. That the suit occupied the whole day, and until a late hour in the evening, when the jurors became impatient, and anxious about their horses, which were tied in different places about the court-house: that, under this influence, they determined to render a verdict for any sum that might be named, and, therefore, agreed to the enormous verdict which was rendered. 2d. That, *Warner Lewis*, the younger, was residuary legatee of his father, and, therefore, entitled to this property, if no debts of his father required its use. In that case, the executors of *Warner Lewis*, the elder, would only have the legal estate, while *Warner Lewis*, the younger, would be entitled to the usufructuary interest. In that case, it would be the duty of the executors of *Warner Lewis*, the elder, to deliver up to *Warner Lewis*, the younger, the legal as well as the equitable interest in the property; and a Court of Equity, considering that as done which ought to be done, will treat the case as if the whole estate, legal and equitable, was actually transferred to *Warner Lewis*, the younger. To prove that this property was not necessary to pay debts, they referred to the will of *Warner Lewis*, the elder, by which it appears, that the testator

1823. had provided specific funds for the payment of his own  
 December. and his father's debts, which he considered more than suf-  
 Lewis's adm'r. ficient to discharge them, and were in fact abundant to sa-  
 v. tisfy every claim against the said *Warner Lewis*, the  
 Wyatt. elder. To prove this, they refer to the report of the com-  
 missioner, in the suit of *Ellis and wife v. Grymes and  
 others*. By that report, it will appear, that the executors of  
*Warner Lewis*, the elder, *actually collected* from the funds  
 set apart by their testator, for the payment of his debts, the  
 sum of 7,927*l.* 2*s.* 10½, and only disbursed of that sum, in  
 paying these debts, the sum of 5,744*l.* 15*s.* 8½; leaving a  
 balance in the hands of the executors, of 2,182*l.* 7*s.* 2½.  
*Warner Lewis*, the elder, died in 1792. This report was  
 made in 1807, fifteen years after his executors had had the  
 management of his estate. Consequently, it is fair to in-  
 fer, that when this report was made up, there were no re-  
 maining debts of the testator then unpaid. This being  
 the case, it was the duty of the executors to have given up  
 these subjects absolutely to the legatee, *Warner Lewis*,  
 the younger, or to *John Lewis*, his executor. If this had  
 been done, there would have been no doubt of the right of  
 the complainant *Wyatt*, to levy the execution in his hands,  
 upon the estate of *Warner Lewis*, the younger, or his  
 executor. This view of the subject derives confirmation  
 from the circumstance, that the executors are shewn to  
 have assented to the legacy given by *Warner Lewis*, the  
 elder, to his son *Warner*, on the 15th of February, 1792,  
 immediately after the death of *Warner Lewis*, the elder,  
 and took from him a refunding bond, without any surety.  
 This property, *Warner Lewis*, the younger, retained in  
 his hands, without any control of the executors, until the  
 4th day of October, 1797, when, having become involved  
 himself, a pretended bill of sale of that date, conveying  
 the property to them again, was executed by him. This  
 bill of sale they never thought it worth while to re-  
 cord; but, permitted *Warner Lewis*, the younger, to re-  
 tain the property thereby pretended to be conveyed, as

long as he lived, and even to convey it in trust, for the purpose of securing certain debts of his own, and to bequeath it by his will; and, after his death, they suffered *John Lewis*, his executor, to retain possession of it, never pretending to set up any adversary title of theirs, until a part of it was taken under the execution before-mentioned. For these and other reasons, the complainants prayed, that *Mann Page*, the sole surviving executor of *Warner Lewis*, the elder, deceased, might be made defendant; and that the judgment before-mentioned, for \$ 5,000, might be perpetually enjoined, &c.

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Annexed to the bill, is the record of the action of trespass, with the verdict as above stated, and the bond of indemnification given to the executors of *Warner Lewis*, the elder, in the penalty of £ 10,000, in consideration of the said *Warner Lewis*, the younger, being permitted to hold and possess the slaves, furniture, and personal estate, of *Warner Lewis*, the elder, deceased. This bond is dated on the 15th of February, 1792, and is without any surety.

Also, the paper termed the *bill of sale*, dated the 4th of October, 1797, executed by *Warner Lewis*, the younger, under his seal, witnessing, that the said property is considered by him as held in trust for the use, and liable to the disposal of his father's executors, or the survivor of them, and that he has no title, interest or estate, in the said property, so as in any manner to dispose of it, without the license or assent of the said executors. "It is to be understood, nevertheless, that this instrument is not intended to invalidate, or alter the validity or condition of the above-mentioned bond."

The report of the commissioner, mentioned in the bill, in the suit of *Ellis and wife v. Grymes and others*.

The affidavits of six of the jurymen who tried the action of trespass, supporting the allegations of the bill, respecting the manner in which the verdict came to be rendered.

The Chancellor granted the injunction.



1823.  
December.

Lewis's  
adm'r.  
v.  
Wyatt.

*Mann Page* answered the bill, and stated, that the trial at law was a fair one, and the motion for a new trial overruled, after a full and fair argument at the bar, and a mature consideration by the Court; that the defendant appealed from this judgment, but the appeals were never prosecuted; that on the motion for a new trial, the defendant did not bring forward any of the jurors to establish the facts stated in the bill, that the sale was unfairly conducted; that the property seized was the property of the executors of *Warner Lewis*, the elder, and a most atrocious trespass was committed in taking it; that the jury did not give vindictive damages, as stated in the bill, but for the actual value of the property, according to the fairest estimate they could make; that it is true, a refunding bond was taken by *Burwell Starke*, one of the executors of *Warner Lewis*, the elder, without security; but, it is also true, that *Warner Lewis*, the younger, afterwards surrendered the said property to *Philip L. Grymes*, one of the executors of *Warner Lewis*, senr., and it was delivered by the said *Grymes* to *George Catlett*, as his agent, and the instrument, called in the bill a *pretended bill of sale*, was executed by the said *Warner*, the younger, on the actual delivery of the property, as above stated; that the younger *Warner Lewis* explicitly admitted the title of his father's executors, by a deed of trust executed by him, and recorded in the General Court; that he does not believe the statements of the plaintiffs, that vast sums remained in the hands of the executors, to pay the debts of their testator; and as to the accounts made up by the commissioner, they were *ex parte* as to himself, and he believes them to be so as to the other executors; that *Ellis* was not ignorant of the existence of the bill of sale aforesaid, as the defendant had shewn it to him, and he read it some days before the sale; and that the sale was forbidden by the defendant.

The suit having abated by the death of *Mann Page*, the defendant, it was revived against *John Lewis*, administrator *de bonis non* of *Warner Lewis*, the elder.

It also abated as to *John Ellis*, by his death.

The cause being removed to the Richmond Chancery Court, the Chancellor decreed, that the injunction should be made perpetual.

The defendant appealed to this Court.

*Nicholas and Leigh*, for the appellant.

*Wickham*, for the appellee.

*December 12.* Judge BROOKE, delivered the opinion of the Court:

The Court being satisfied, that the beneficial interest in the property on which the execution was levied, was in *Warner Lewis*, the younger, as residuary legatee, though the naked legal estate may have been in the executors of *Warner Lewis*, the elder, by virtue of the bill of sale, as to which, after the judgment at law, the Court does not mean to decide; and, being also satisfied by the pleadings and proofs in the cause, that nothing was due by the estate of *Warner Lewis*, the elder, on account of debts or legacies, when the execution was levied; and that the damages found by the jury in the action of trespass, enured to the benefit of *Warner Lewis*, the younger; is of opinion, that it would be against conscience to permit the debtor to pay his debt, and at the same time, recover damages against his creditor, on the distinction, (as to which there was some doubt,) that he held a *beneficial* interest only, and not a *legal* title in the property on which the execution, in behalf of his creditor, was levied. In coming to this conclusion, the Court deems it unnecessary to decide on the alledged misbehaviour of the jury, and for the reasons stated, is of opinion to affirm the decree.\*

1823.  
*December.*  
Lewis's  
adm'r.  
v.  
Wyatt.

\* Judge CABELL absent from indisposition.

1823. EVANS and Wife, &c. v. KINGSBERRY and Wife.  
*December.*

Where land is not converted *out and out*, and at all events, into personal estate, but on the contrary, its conversion depends on a condition, it will not be considered in equity as personal estate.

But, when a valid sale is made, *and not till then*, the surplus proceeds of sale (after paying the debts charged upon the estate,) would be personal property, belonging to the person then entitled to redeem, and transmissible to his personal representative.

A conveyance by a husband will pass the entire interest of his wife, entitled to a life estate in lands, in the event of his surviving, but, if she survives him, it passes only an interest during his life.

Where a purchaser cannot get a title to *all* he contracted for, if he can get the substantial inducement to the contract, he may insist upon taking, or he may be compelled to accept, a title to so much as the other party can give a good title to, with a reasonable compensation for what the party cannot effectually convey.

This was an appeal from the Court of Chancery at Lynchburg.

In the year 1813, John W. Bradley was the owner in fee simple, of a tract of land, subject to a life-estate in one moiety thereof, to which his mother, Mary Evans, was entitled. On the 28th of April, and 8th of May, 1813, he conveyed this land to James Martin and Joseph Slaughter, jointly, by two several deeds of trust, to secure the payment of two debts, due to Charles Clay, with authority to the trustees, or either of them, to sell, for that purpose, at auction, *for cash*; and with a provision, that they should pay over the surplus money, if any, "to the said John W. Bradley, his heirs, executors, or administrators, or to his written order."

After the execution of these deeds, and before any sale under them, John W. Bradley died intestate, leaving Mary Elizabeth Bradley, an infant child, his only heir, and leaving a widow, Nancy M. Bradley, the mother of his infant daughter. Walter Dunnington became his administrator.

After the death of John W. Bradley, James Martin, one of the trustees, advertised a sale for cash, under these deeds, to take place on the 9th of June, 1814. At the foot of the advertisement, is a note, signed by Walter Dunnington, the administrator, saying that, by agreement with Clay, the creditor, the sale would be for one half cash, the balance on a credit; and that he was authorised to say, there would be no difficulty in the purchaser's getting a complete title to the land, from those interested.

1823.  
December.  
Evans, &c.  
v.  
Kingsberry, &c.

Mary Evans, the mother of John W. Bradley, who had the life-estate in a moiety of this land, was a married woman, and with her husband, William Evans, executed a power of attorney to the aforesaid Walter Dunnington, dated the 4th June, 1814; reciting the contemplated sale, and their willingness to have their interest in the land sold at the same time, "provided, half of the money or bonds, arising from such sale, is received by us, from the purchasers;" authorising their attorney to dispose of their interest in the land for them, and agreeing to make proper deeds.

The whole land was accordingly sold, by the trustee, to James C. Moorman, for a sum per acre, which amounted to upwards of \$8,500, one half to be paid in cash, the other half at Christmas next ensuing the sale. Moorman paid the debts of the creditor, Charles Clay, amounting to \$2,719, but paid no more of the purchase money.

Shortly after the sale, the land was surveyed, in the presence, and with the approbation of the purchaser, Moorman; and the quantity being ascertained, a deed was made by the trustee, Martin, dated the 30th June, 1814, conveying the whole land to Moorman; but, it does not appear that this deed was ever recorded, or delivered to Moorman, or accepted by him.

Evans and wife also executed a deed, dated the 9th November, 1814, purporting to convey their interest in the land to Moorman; and there is a commission for her privy examination, and a certificate of the magistrates annexed

1833. to this deed. This certificate is imperfect; and, among  
*December.* other imperfections, it omits to state that the wife was  
 Evans, &c. privily examined.

*v.* This deed was refused by Moorman, he having become  
*Kingsber-* dissatisfied with his purchase, and unwilling to carry it into  
*ry, &c.* execution.

Nancy M. Bradley, the widow of John W. Bradley, who had not relinquished her dower in her husband's life-time, also executed a deed to Moorman, dated the 11th of August, 1814, irregularly proved and certified, from North Carolina, not recorded in this State, and not accepted by Moorman.

Moorman was acquainted with the state of the title at the time of his purchase, and he shortly after expressed himself well pleased with the purchase, and offered to sell the land to one or two persons. It does not appear, that he took possession of it, till after this suit was brought, and then only by renting it, while the suit was pending.

In February, 1815, the original bill was filed, in which Martin, the trustee, William Evans and his wife, Nancy M. Bradley, the widow, Mary Elizabeth Bradley, the infant heir, by her mother, the said Nancy, her next friend, and Walter Dunnington, the administrator, are plaintiffs; and James C. Moorman is the defendant.

The bill alleges the facts above set forth; alleges, that Evans and wife, and the other plaintiffs, are still willing to ratify the sale; that Moorman has taken possession of the land, and accepted the deed from the trustee, and prays a specific execution of the contract.

Moorman admits the purchase, but denies that he has taken possession, or accepted any of the deeds, and assigns as the reason for not carrying the contract into execution, the want of obligation, on the part of Mrs. Evans, to comply on her part, and the delay of her husband and herself to make the deeds after repeated application, so that his views in the purchase had been disappointed, and he had lost the opportunity of making an advantageous sale;

prays, that he may be placed in the shoes of the creditor, whose debt he has discharged, and that the land may be resold, to refund him the money and interest.

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Evans, &c.  
v.  
Kingsberry, &c.

At the May term, 1816, the plaintiffs had leave to amend their bill, and make new parties; whereupon, an amended bill was filed by Walter Dunnington, the administrator, alleging that unless the surplus proceeds of the sale, be considered as assets in his hands, the personal assets will be insufficient to pay both simple contracts and specialties, praying that the assets may be marshaled, and making the heirs of John W. Bradley, defendants.

When this amended bill was filed, Mary Elizabeth Bradley had died, at about three years of age, and her mother Nancy was then married to Kingsberry. The heirs of Mary Elizabeth, on the part of her father, were her grandmother Mrs. Evans, one of the plaintiffs in the original bill, and her father's sisters, Mrs. Dunnington, the wife of the administrator, Mrs. Brown, the wife of Lewis Brown, and Ophelia Bradley, an infant.

These matters are not mentioned in the amended bill; but it is answered, by Evans and wife, Dunnington and wife, Brown and wife, Ophelia Bradley by her guardian ad litem, and by \_\_\_\_\_ and Nancy M. his wife, who say, they know nothing of the matters set forth in the amended bill, and that they are willing that what is right should be done.

Brown and wife also file a separate answer, stating, Mrs. Brown and her sisters to be the heirs of John W. Bradley, since the death of Mary Elizabeth Bradley.

The depositions of Nicholas Harrison, Christopher Fowler, and Robert C. Scott, prove nothing material, except that Moorman was pleased with his purchase, was present at the survey, aided in fixing the corners and lines, and offered the land for sale.

On the 15th May, 1817, the cause came on for hearing; when the other parties, acceding to the prayer in Moorman's answer, and consenting to absolve him from his pur-

1823. chase, and have a re-sale of the land: a re-sale was accord-  
*December.* ingly directed, a provision made for reimbursing Moor-  
 Evans, &c. man his advance to the creditor, and an account of rents  
*v.* and profits directed. At the same time, a memorandum  
 Kingsber- is entered of record; which was intended to provide, that  
 ry, &c. the assent given by the parties to that decree, should, in  
 no manner, affect their respective rights to the surplus of  
 the purchase money.

The land was re-sold under the decree, an account of  
 rents and profits taken, and Moorman reimbursed his ad-  
 vance.

At the October term, 1817, the plaintiffs had again leave  
 to amend their bill; and in pursuance of that leave, Kings-  
 berry and wife filed a supplemental bill, praying a ratifica-  
 tion of the sale to Moorman, and claiming the surplus pro-  
 ceeds of the sale, as personal property, which, belonging  
 to Mary Elizabeth at her death, passed to her mother,  
 Mrs. Kingsberry; or, if that could not be granted, then  
 dower, or money in lieu thereof. To this bill, all the other  
 parties to the suit are made defendants.

Evans and wife, in answer to this bill, insist, that the  
 sale to Moorman is not valid, because not made pursuant  
 to the trust deed, and because, Mary Evans, being a mar-  
 ried woman, was not bound by her assent thereto. They  
 insist, that the condition on which that was given, has not  
 been complied with, and they now retract it; that the deed  
 made by them, was insufficient to bind a married woman,  
 originally, and was never accepted, and they now retract  
 it. They refuse any longer to prosecute the original bill,  
 for specific performance, or to do any thing else to ratify  
 the sale, and claim one fourth of the equity of redemption  
 in the land, as the inheritance of Mrs. Evans, the paternal  
 grandmother of the infant Mary Elizabeth.

The answer of Dunnington and wife, Brown and wife,  
 and Ophelia Bradley, refers to the answer of Evans and  
 wife, objects to the ratification of the sale to Moorman,  
 and claims the inheritance from Mary Elizabeth as her  
 paternal heirs.

Moorman's answer refers to his former answer.

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Evans, &c.

v.  
Kingsber-  
ry, &c.

Issue is taken upon these answers, and an agreement of parties filed, whereby it is provided, that the pleadings upon this supplemental bill are to be regarded as having been filed at the commencement of May term, 1817, before any decree was pronounced in the cause, and that the assent, yielded to that decree, should in no manner whatever, affect the rights of the several representatives of Mary Elizabeth Bradley, as to the distribution of the surplus money. This agreement also ascertains the facts as above set forth, as to the death of Mary Elizabeth, the marriage of her mother, and the relationship to her of Mrs. Evans, Mrs. Dunnington, Mrs. Brown, and Ophelia Bradley.

At May term, 1818, the right of Evans and wife, to a moiety of the rents, and their right for the life of Mrs. Evans to a moiety of the purchase money, not being contested, a decree, by consent, is made, directing payment thereof, on the proper condition.

At the October term, 1818, these causes were heard together, by consent, and the Court deciding, that by the terms of the deeds of trust referred to by the bill in the first suit, the overplus of the money, after payment of the debt, interest and expenses secured by the said deeds, ought to be considered as personal estate, directed accounts, &c. accordingly.

At the May term, 1821, Ophelia Bradley having intermarried with Robert Venable, he is made a party to the suits, and on the motion of Evans and wife, Dunnington and wife, Brown and wife, and Venable and wife, an appeal is allowed them from so much of the decree of October, 1818, as determines, that the surplus money is personal estate, and goes to the personal representative of Mary Elizabeth Bradley.

*Johnson*, for the appellant.

The question is, whether the *paternal* or *maternal* kindred are entitled to the proceeds of the sale; or, in



1823. in other words, whether the property is to be considered  
*December.* as *real* or *personal* estate. The Chancellor has decided,  
 Evans, &c. that it is to descend as *personal* estate.

v.  
 Kingsber- It is certain, that the grantor and his heirs held the *equi-*  
 ry, &c. *ty of redemption*; and the only question is, whether the  
 sale to *Moorman* was valid? This question has a two-  
 fold aspect: 1. As it relates to *Moorman*. 2. As it re-  
 lates to the other parties to the supplemental bill.

1. There was no written agreement, which is ne-  
 cessary by the statute of frauds. If it should be said,  
 that there was part performance, the answer is, that there is  
 no evidence of such a possession, except *pendente lite*;  
 and it cannot be supposed, that he would take possession  
 under the deed, at the very moment that he was contest-  
 ing its validity.

It is now admitted, that a sale at auction is within the  
 statute of frauds. It is true, the statute is not pleaded;  
 but it is not necessary in this case. Although great diver-  
 sity of opinion has existed among the English Chancel-  
 lors, on this subject, it is now the settled doctrine, that if  
 a contract is admitted, and the statute pleaded, the defendant  
 is entitled to its benefit. It would follow, then, that if the  
 statute is not pleaded, the defendant is entitled to its bene-  
 fit; because, it is a general law of the land, of which Courts  
 take notice, of course. Although *Moorman* does not  
 plead the statute expressly, yet he states generally, that he  
 ought not to be compelled to execute the agreement, and  
 that is sufficient.

*Moorman* not being bound to comply with the bargain,  
 the other parties were equally free.

The sale and conveyance were made by only one trustee;  
 but *both* were necessary to join in executing a trust  
 confided to both.

The authority in the trust deed was departed from, in  
 selling upon credit and not for cash. It is vain to say, that  
 this mode of sale was more beneficial. The deed must  
 give the rule.

2. As to the other parties to the supplemental bill, the decree is erroneous. Mrs. *Evans*, being a married woman, could not be bound by her assent, without a privy examination, which was not obtained in this case. She, therefore, had a right to retract, and did retract, the assent which she had informally given; and without her assent there could be no decree for a sale.

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Kingsberry, &c.

Payment of purchase money is not such a part performance as a Court of Equity will enforce. *Sugd.* 86, 91; *Newl. on Cont.* 187; *Clinan v. Cooke*, 1 Schoal. & Lefr. 40.

It may be said, that our statute of frauds differs from the English statute, in not containing a distinct provision as to goods, by which it is declared, that *sales of goods* shall be binding, if *earnest money* is paid; and from which alone it is inferred, that in England, the sale of real estate is not bound by the payment of part of the purchase money. In this country, however, it may be said, the omission of such a clause destroys the implication, that payment of purchase money does not bind an agreement with respect to real estate.

To this, it may be answered, that our statute, as far as it goes, being borrowed from the English statute, ought to receive the same construction, where the provisions are similar. But, the true reason is, that the payment of purchase money does not place a man in such a situation, that he cannot obtain compensation. *Butcher v. Butcher*, 9 Ves. jun. 382; *Jackson v. Cutright*, 5 Munf. 309, (Judge Carr's opinion;) *Sugd.* 92; *Buckmaster v. Phillips*, 7 Ves. jun. 341.

*S. Taylor*, for the appellee.

The first objection to this contract is, that it is not in writing, and, therefore, a specific execution could not be decreed.

1823. To this objection, two answers may be given: 1. The  
*December.* defendant admits the contract by his answer, as charged in  
*Evans, &c.* the bill, and neither pleads nor relies upon the act against  
*v.* frauds and perjuries. The admission stands in the place  
*Kingberry, &c.* of a written contract. "If a defendant does not say any  
 thing about the act in his answer, he must be taken to  
 renounce the benefit of it." *Cooth v. Jackson*, 6 Ves.  
 39; *Croyston v. Banes*, Prec. Cha. 208; *Symondson v.*  
*Tweed*, Prec. Cha. 374; *Whitchurch v. Bevis*, 2 Bro.  
 C. C. 566-7. The plaintiffs do not admit the answer  
 throughout, by resorting to it for evidence, but the matter  
 alledged in the answer, in evidence, must be proved.

2. The contract in this case was in part performed, and,  
 therefore, it is not within the act. A substantial part of  
 the purchase money was paid, viz: \$2,719 23, out of  
 \$8,538 94. That this will take a case out of the statute,  
 is maintained by the cases of *Main v. Milbourne*, 4 Ves.  
 721, and *Lacon v. Mertins*, 3 Atk. 1. The depositions  
 of *Fowler* and *Scott*, prove, that *Moorman* attended the  
 survey, assisted in putting up corner stones; and the last  
 witness proves, that *Moorman* was in possession. *Har-*  
*rison* proves, that *Moorman* offered the land for sale.  
 The commissioner's report proves, that *Moorman* rented  
 out the estate for three years. Fixing up corner stones,  
 and taking possession of the estate, could only have been  
 done with a view to the performance of the agreement,  
 and take the case out of the act. *Sugd.* 83.

The next objection is, that the plaintiffs did not comply  
 with the contract, and were not bound to comply.

*Answer.* If a *feme covert*, by her agreement, induces  
 a purchaser to part with his money, equity will compel her  
 to perform her agreement. The power of attorney, and  
 deed of *Mary Evans*, bound her in equity to convey;  
 even if the certificate of privy examination be defective.  
 So, if a wife agrees to join her husband in a surrender and  
 fine, and she dies, equity will enforce the agreement.  
*Bridg. Index*, title Baron and Feme, cases 212, 217, 218,  
 219.

It is next objected, that only one of the trustees sold and conveyed, which is not an effectual legal conveyance.

The answer to this is, that the deed authorises either trustee to sell and convey. The legal title was jointly and severally in the trustees, and not *jointly* merely.

It is said, that the trustee did not pursue the power vested in him by the deed, in selling on a credit, and not for *cash*, as required by the deed. But, the purchaser, with his eyes open, incurred the risque, if there was any, of an objection from the infant heir of the grantor. The sale on a credit was for the advantage of the infant, and, therefore, there was no ground for apprehending an objection. Indeed, she could not object; for, while she might have redeemed the estate, before a sale, the deeds provided that the trustee, in the event of a sale, should sell the estates *out and out*. The claim of the heir, in the event of a sale, was on the surplus proceeds after paying the debts, and not on the land.

But, if the trust was improperly executed, it might subject the trustee to the heir, but not the purchaser.

It has been said, that if *Moorman* could not compel a specific execution against the plaintiffs, they could not compel a specific execution against him. But, there is no reason for this sort of mutuality. If the vendor can make a title at the time of the decree, the purchaser will be compelled to complete the purchase.

*December 15.* Judge GREEN, delivered the following opinion; in which the other Judges concurred:\*

The deeds of trust of the 28th of April, and 8th of May, 1813, did not convert the lands thereby conveyed, into personal estate, in the contemplation of a Court of Equity, since they did not provide that the lands should be converted *out and out*, and at all events into money; on

\* Judge CABELL, absent from indisposition.

1823. the contrary, the sale was to be made only on the request  
 December. of *C. Clay*, or of *J. W. Bradley*; and, until a sale was  
 Evans, &c. actually made, *J. W. Bradley*, or his heirs at law, might  
 v. have redeemed the land, upon the payment of the debts  
 Kingsber- secured by the deeds. Whensoever a *valid* sale should be  
 ry, &c. made, and not until then, the surplus proceeds of sale, af-  
 ter paying the debts, would be personal property, belong-  
 ing to the person then entitled to redeem, and transmissi-  
 ble to the personal representatives of the person so enti-  
 tled; and this, whether the contract of sale had been per-  
 fected before the death of the party entitled to the surplus,  
 by conveyance or not. For, in such case, a Court of Equity  
 would consider that as done, which ought to have been  
 done. Whether the heirs of *Mary E. Bradley* were en-  
 titled to the equity of redemption in the land upon her death,  
 or her personal representative was entitled to the surplus  
 proceeds of the sale made to *Moorman*, depends upon the  
 question, whether, at the time when the cause was first  
 heard, that contract could have been enforced against  
*Moorman*, at the instance of that personal representative  
 and the trustees, or against the other parties to the contract,  
 at the instance of *Moorman*. At that time, (as the agree-  
 ment of the parties requires the case to be considered,) *Evans*  
 and wife had retracted, by their answer, their as-  
 sent originally given to the contract. If *Moorman* was,  
 in other respects, bound to execute the contract, he could  
 not be bound to do so, unless the parties insisting upon the  
 performance had been able, at the hearing of the cause,  
 to give to or procure for him, such a title as he contracted  
 for. The title of *Evans* and wife could not be procured,  
 unless they were already bound by the deed which they  
 had executed, and which *Moorman* had refused to accept,  
 or unless their title would have passed by that deed, if the  
 Court had compelled *Moorman* then to accept it; or, un-  
 less the Court could have compelled *Evans* and wife to ex-  
 ecute a new conveyance, or to deliver that already execu-  
 ted to him. No title passed by the deed, as it never was

delivered. By the refusal of *Moorman* to accept it, the deed lost its force as a deed; and a subsequent delivery, by order of the Court, without the assent of *Evans* and wife, would have given it no validity. 5 Co. 1196. The Court might have compelled *Evans* to execute the contract by conveying his interest, either at the instance of *Moorman*, or of the trustee and personal representative of *M. E. Bradley*. But, the contract could not be enforced against Mrs. *Evans*, but with her assent. A conveyance by *Evans* would have passed the entire interest of his wife, in the event of his surviving; but, if she survived him, only an interest during his life. And, in that case, she would have been entitled to an estate for her life in a moiety of the land. When a purchaser cannot get a title to all he contracted for, if he can get the substantial inducement to the contract, he may insist upon taking, or he may be bound to accept, the title for so much as the other party can give a good title for, with a reasonable compensation for so much as the party cannot make a title to; or, in case the title is defective in a small matter, perhaps a purchaser might be compelled to accept the title, with an indemnity against the defect of title. But, the contingency of Mrs. *Evans* surviving her husband, and, in that event, becoming entitled to a moiety of the land for her life, was such a defect as could not be compensated, since there was no rule by which its value could be estimated; nor, was it such a defect as the Court ought to have compelled the purchaser to accept an indemnity against. The contract could not, therefore, be enforced by any of the other parties against Mrs. *Evans*, and was consequently null, and the equity of redemption descended, on the death of *M. E. Bradley*, upon her heirs at law, subject to Mrs. *Kingsberry's* right of dower. The decree should be, therefore, reversed, and the cause remanded, to be proceeded in accordingly.

1823.  
December.  
Evans, &c.  
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1823.

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## STOUT v. JACKSON.

Where a freehold estate has been conveyed with warranty, and the warrantee afterwards evicted, the proper measure of damages is the value of the land at the time of the warranty, and not at the time of the eviction.

*Quere.* Will an action of covenant lie on a mere real warranty?

The purchaser in such case can only recover rents and profits of the vendor, and not the value of any improvements he may have put upon the land.

The best standard of value is, in general, the price agreed upon at the time of the sale.

These rules apply equally to *executed* and *executory* contracts. *Quere.*

This was an action of covenant brought in the Superior Court of Law for *Harrison* County, by *John G. Jackson* against *Joseph Stout*. The declaration states, that on the 22d day of September, 1809, the said *Joseph*, by his certain deed in writing, sealed with his seal, and here in Court produced, and executed at *Harrison* aforesaid, did grant, bargain, sell, and convey to the said *John*, his heirs and assigns forever, a tract of land in the county of *Muskingum*, and State of *Ohio*, &c., containing four hundred acres, more or less; and the said *Joseph* did covenant and bind himself to the said *John*, that he would forever warrant and defend the said land and appurtenances to the said *John*, against all persons and all claims whatsoever, and that he had full power and authority to convey the same, clear of incumbrances, to the said *John*: that, after the conveyance aforesaid, one *Clark Hollenback*, by the decree of the Supreme Court of *Ohio* for *Muskingum* county, pronounced on the 4th day of October, 1813, recovered the same tract of land, with costs of suit, from the said *John*, in consequence of incumbrance upon the same land, created by the illegal conduct of the said *Joseph* or *William Martin*, prior to the conveyance by the said *Joseph* to the said *John*, and in consequence of a sale made of the same land to the said *Clark*, prior to the said conveyance. And the plaintiff assigns as breaches of the covenant aforesaid, that the said land, at the time of the execution of the

deed aforesaid, was not clear of incumbrances, and the said *Joseph* had not full power to convey the same to the said *John*, and that he hath not warranted and defended the said land to the said *John*.

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The tract of land in question was conveyed by *William Martin* to *Joseph Stout*, by deed dated the 22d day of September, 1809.

The deed from *Stout* to *Jackson*, is dated the same day and year, and contains the following clause of warranty, on which this action was founded; "and the said *Joseph Stout*, for himself, his heirs, &c. doth hereby covenant to and with the said *John G. Jackson*, that he the said *Joseph Stout*, his heirs, &c., shall do and will warrant and forever defend, the above described tract or parcel of land, with its appurtenances, to the said *John G. Jackson*, his heirs and assigns, against all persons and all claims whatsoever, and that he hath full power and authority to convey the same, clear of incumbrances, to the said *John G. Jackson*, his heirs and assigns."

The defendant having craved oyer of the writings in the declaration mentioned, pleaded; 1st, that he had not broken his covenants; and 2d, that he had well and truly performed all and singular the covenants on his part to be performed. The plaintiff replied generally, and issue was joined.

At the trial, the jury found a special verdict in these words: "We, the jury, find, that the defendant hath not kept his covenants made with the plaintiff. We further find that the defendant hath broken his covenants, and that one *Clark Hollenback* did recover the same land of the plaintiff, by the decree of the Supreme Court of *Ohio*, upon an action prosecuted therein by said *Hollenback* against the plaintiff and the defendant, and one *William Martin*, in consequence of a superior equitable title subsisting at and prior to the conveyance by the defendant to the plaintiff; by which decree, the plaintiff was decreed to convey to the said *Clark Hollenback* the legal title of said land. We further find, that the deed in the declaration mention-



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ed, was made in Virginia, and at the time thereof the defendant was not in possession, but the land in the deed mentioned, was, at the time of said deed and covenant, in the actual possession of a tenant holding under *Clark Hollenback*, the person in the declaration mentioned, and the said *Hollenback* then claimed under a title adverse to the claim of the defendant. We further find, that the plaintiff had no possession under said deed until some time in October, in the year 1809, when the plaintiff procured possession of the said land by an agreement with one *Aaron Claypole*, who then held possession under said *Hollenback*, but abandoned his lease from said *Hollenback*, and by consent of said *Jackson* and said *Claypole*, became the under-tenant of said plaintiff; and that the plaintiff continued in possession, until he was evicted thereafter by the decree of the Supreme Court of *Ohio*, in consequence of a superior title subsisting at the time of the conveyance to him by the defendant. We also find for the plaintiff, in damages, \$2,937 50, with interest from the 4th day of October, 1813, if the jury ought to find damages to the value of the land and improvements, at the time of the eviction in the declaration mentioned. We also find for the plaintiff, \$900 damages, with interest from the 22d day of September, 1809, if the jury ought to find no more than the price paid by the plaintiff to the defendant for said land, with interest."

The following facts were agreed between the parties, and, by their consent, made a part of the case submitted to the Court, together with the special verdict:

"It is agreed, that the possession of *Hollenback*, found by the jury, was acquired as follows: *Aaron Claypole*, the tenant therein mentioned, purchased the land of *Hollenback* in 1805, after he bought of *Stout*, and took possession thereof, and held under him: that he afterwards gave up his possession to *Martin*, (who held the legal title,) without the knowledge or consent of *Hollenback*. The land was conveyed by *Martin* to *Stout*, and by *Stout*,

the defendant, to the plaintiff. Upon the application of *Hollenback*, and without the knowledge of *Martin*, *Claypole* gave possession to *Hollenback*, and then leased of him, and continued on the land, and lived there on the day of conveyance to the plaintiff.”

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The Court gave judgment, that the plaintiff recover against the defendant, the sum of \$2,937 50, with interest thereon from the 4th day of October, 1814, damages by the jurors, in their verdict assessed, and his costs, &c.

*Stout*, the defendant, obtained a *supersedeas*.

The case was argued by *Wickham*, for the appellant, and *Leigh*, for the appellee; but, the full discussion by the Court, renders a report of the arguments at the bar unnecessary.

*December 15.* The Judges delivered their opinions.\*

Judge GREEN. This case presents the question, what is the measure of compensation in the case of a warranty of a freehold estate, and an eviction of the warrantee? This, as far as I am informed, is the first instance in which that question, in an action of covenant, has been presented to the Supreme Judicial Tribunal in Virginia, for adjudication. It is a question of great importance, and entitled to a most careful consideration. Although it has never been the subject of direct adjudication, yet, in several cases, Judges, whose opinions are entitled to great weight, have incidentally given their opinions upon it. The first of these cases, is that of *Mills v. Bell*, 3 Call, 322. In that case, by a contract between *Bell* and *Mills*, in February, 1778, the former agreed to sell to the latter, two tracts of land, which he agreed should contain 300 acres, and for which he was to make *Mills* a sufficient title the next November. *Mills* was to pay for the land, £ 500; one hundred down, sixty

\* Judge CARR, absent from indisposition.

1823. pounds the next November, and sixty pounds every year  
*December.* following, until the whole was paid. The £ 100 was paid  
 down, and £60 the next November, and £ 60 in November,  
 1779; after which, nothing more was paid, nor was  
 any conveyance made. *Bell* had purchased these two  
 tracts of land of different persons. For one of 90 acres,  
 he had procured a title; for the other of 210 acres, he had  
 not procured a title, and the vendor, in an action of ejectment,  
 evicted *Mills*, after the before-mentioned payments were made;  
 how long, does not appear. The defect of the title was known  
 to the parties in 1781; but how long before, does not appear.  
 The payments, which were punctually made, exceeded the price  
 of the 90 acres; and *Mills* sued *Bell* in Chancery, for a title to the  
 90 acres, and compensation for the loss of the 210 acres. The  
 opinion of the Court was delivered by *Pendleton*, President. After  
 ascertaining that *Mills* was entitled to compensation for the loss  
 of the 210 acres of land, the opinion proceeds: "The first point  
 which presents itself to the consideration of the Court, is, by  
 what ratio the compensation to be made to *Mills*, for the land  
 evicted, is to be ascertained? Whether the value of them, at  
 the time of eviction, or at the time the purchase was made? The  
 former would be the rule, if a conveyance had been made with  
 warranty; since the purchaser is entitled, on the covenant, to the  
 increased value of the estate, as well as for any improvements he  
 may have made on it. But when, as in this case, the contract is  
 executory, a Court of Equity will adjust it upon principles of  
 equity, according to the circumstances. And, since *Mills* appears  
 to have been faulty in his payments, which, if regularly made,  
 might have prevented the loss, it ought to be adjusted by  
 proportioning the loss to the value of the whole purchase money  
 for the whole land." The Court proceeded to decree, that "the  
 compensation should be adjusted according to the value of the land  
 at the time of the agreement, of which there was no evidence,  
 except the consideration agreed to be paid;" which

was adopted, and *Bell* decreed to convey the 90 acres, and re-pay the money received beyond the price of that part of the land. There was evidence in the cause that the value of the land had, between the time of the agreement and the hearing of the cause, increased more than six fold.

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The next case, in which this question appears to be alluded to, is that of *Nelson v. Matthews*, 2 Hen. & Munf. 177. There, the purchaser got the very land contracted for, and was not evicted from any part. But, there was a deficiency in quantity, for which he claimed a discount from the purchase money. He was relieved to the extent of the deficiency, according to the average value of the land, at the time of the sale, as ascertained by the report of commissioners. A part of the land had been conveyed by the vendor, with general warranty; the residue by another, from whom *Matthews* had purchased; but whether with warranty or not, does not appear. Judge TUCKER, in delivering his opinion, in this case, says: "If, indeed, there had been the full quantity of land in each tract, and *Nelson* had been evicted of a part by a title superior to that of *Matthews*, the proper estimate of his damages would have been according to the actual value of the land recovered; for, then it might have been precisely known." And, again: "Whereas, if the money had been paid, and the purchaser had been evicted by a superior title, I should have thought the value ought to have been fixed, as it might have been, at the time of eviction."

This subject was again adverted to, in *Humphreys v. M'Clanachan*, 1 Munf. 493. In that case, *M'Clanachan* sold to *Humphreys*, two land warrants, which had been located; to a part of which, another had a title, not known to the vendor. The purchaser filed his bill, claiming a deduction from the purchase money on that account, which was allowed according to the value ascertained by the price given; the real value not appearing to be different from that agreed upon. Judge TUCKER, there remarks: "the point most strongly contested in this Court,

1823. was, whether *Humphreys* was entitled to compensation  
*December.* for the deficiency (the equitable title to which was, at the  
 time of the contract, in *Rhodes*,) according to the average  
 price of the whole, or, according to the specific value of  
 the land, when *Rhodes* acquired his legal title thereto.  
*Stout* The price of lands must, in all cases, between the purcha-  
*v.* ser and seller, be considered as the just value thereof, at  
*Jackson.* the time of the contract, &c." "If the contract be exe-  
 cutory on both sides, the party who hath not yet fulfilled  
 his own engagements, comes with an ill grace before a  
 Court of Equity, to demand ample compensation, or more  
 properly speaking, *vindictive damages*, against the other  
 party for any deficiency or failure on his part." And,  
 Judge ROANE referred to the rule laid down in *Mills v.*  
*Bell*, in the case of a general warranty and eviction, for  
 the purpose of shewing, that the case of *Nelson v. Mat-*  
*thews* did not conflict with that rule, and with *seeming*  
 approbation.

It may be remarked, that the rule thus stated to exist,  
 has no sort of influence in the decision of those cases; and  
 of course, that question was not, in any of those cases,  
 necessarily considered, and probably not considered at all,  
 but taken for granted. Yet, it might be supposed that  
 those Judges, particularly Mr. PENDLETON, who was fa-  
 miliar with the practice of the General Court, long before  
 the Revolution, spoke from their knowledge of some set-  
 tled practice in the old General Court, upon that subject.  
 Such a rule could only have grown up in actions of cove-  
 nant upon real warranties, certainly not in actions of *war-*  
*rantia chartæ*, or voucher, since the law as to those re-  
 remedies was clearly and uniformly settled to be otherwise.  
 At the time, however, when this *dictum* was thrown out  
 in the case of *Mills v. Bell*, it could not be known to any  
 of the Judges, that any action of covenant, on a real war-  
 ranty, had ever been brought in the old General Court.  
 For, in the case of *Daniels v. Cook*, 1 Wash. 306, in 1794,  
 (which was an action of covenant, upon a warranty by

deed for a negro, made in 1779, brought against the executor of the warrantor, and, at the time of the warranty, slaves were, to some purposes, real property,) it was contended, that the warranty was real, and descended upon the heir of the warrantor, and no action would lie against his executor. The Court declared, that, as to the subject under consideration, slaves were personal estate; and PENDINGTON, President, in delivering the opinion of the Court, said: "without enquiring, whether an executor is bound by such a covenant in a conveyance of real estate, in which he is not named, (which the Court forbear, it being hinted at the bar that there is another case in Court, where that is to be a question,) it is admitted, and clear, that, in personal contracts, if the testator be bound, the executor is also bound, though not named." If, at this time, actions of covenant, or *real warranties*, had been familiar, or if, in any one case, such an action had been maintained, it would have excited great attention, and the Court would probably not have forbore that question; for, in all cases where an action of covenant will lie against the testator, it would lie, of course, against his executor.

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The Judges who have announced the rule, that, upon a warranty, the measure of damages is the value at the time of the eviction, seem to have considered, without examination, that a harsh rule of that sort existed at law, to be moderated according to reason and justice, whensoever a Court of Equity could reach the case. Indeed, Judge TUCKER, in *Humphreys v. M'Clanachan*, whilst he admits the rule, as he had stated it to be in *Nelson v. Matthews*, expressly declares, that such damages are *vindictive*. Accordingly, in every case in this Court, in which the purchaser, whether he had a deed with warranty, or not, has claimed a compensation for lands lost by eviction, or for a deficiency in quantity, he has been compensated according to the value at the time of the contract; and the Court, under the conviction that justice, in no case, required a greater compensation, has, to avoid the force of the

1823. supposed rule of law, seized upon circumstances, which  
*December.* otherwise would be entitled to no weight. As in the case  
of *Mills v. Bell*, the Court affirm, that the purchaser was  
Stout faulty in his payments; and profess to found their judg-  
v. ment on that circumstance, when in fact he had punctually  
Jackson. paid more than he could have been compelled to pay,  
either at law or in equity, and the excess was refunded to  
him. He did not stipulate, nor was he bound by any prin-  
ciple of equity to pay, the subsequent instalments, to en-  
able the vendor to complete the title. The vendor was  
bound by his contract to make him a perfect title, before  
the instalments, which he refused or failed to pay, became  
due; and if, without making such title, he could have ob-  
tained judgments at law for the subsequent instalments, a  
Court of Equity, according to the settled course of this  
Court, would have restrained him from enforcing the pay-  
ment, until the title was made according to the contract.  
The loss to the purchaser by the eviction, was precisely  
the same, in consequence of the failure to make a good  
title, according to his covenant, as it would have been if  
he had made a deed with warranty; and the circumstance  
that the contract was executory, was a reason why the in-  
creased value should have been given in that case, rather  
than in a case of warranty made by one, *bona fide* believ-  
ing that he had a perfect title; for, in the latter case, the  
estate may be lost, without the default of the warrantor;  
but, in that case, the vendor was in default, in not paying  
the purchase money to the person of whom he purchased,  
by which he would have been enabled to secure the title.  
And, in all cases of executory contracts, the compensa-  
tion, in case of failure, when the property sold has in the  
mean time increased in value, should be the same as in  
case of an executed contract, with warranty, and an evic-  
tion; for, the real loss to the purchaser is the same, unless  
he has made improvements at his own expense, a circum-  
stance which will be hereafter considered. And so in the  
many cases in this Court, besides those which have been

cited, in which the Court has given a compensation for a deficiency, according to the price given, or the value at the time of the purchase, it seems to me, that the loss by deficiency (if the lands had increased in value,) was precisely the same as it would have been, if the whole quantity of land had been conveyed, and the purchaser had been evicted from so much as the deficiency amounted to, by title paramount; his loss being, in both cases, of so much of his purchase money, and of a good bargain.

If I had not been informed by one of the Judges who sat in the case, that *Crenshaw v. Smith*, 5 Munf. 415, was wrongly reported, I should have considered that case as entitled to weight, as an authority in point, to shew, that upon a warranty and eviction, the value at the time of the purchase was the measure of compensation. It is, however, at all events, another case to shew, that when the question of compensation is referred to a Court of Equity, that rule will be adopted. The land, for which compensation was there sought, was sold; it had increased, and was increasing in value, at the time of eviction, and the value at the time of the sale was allowed.

If there be no such rule at law as alledged in *Mills v. Bell*, and we were now at liberty to adopt a rule according to the very right of the case, it cannot be doubted, that the rule ought to be the same, both at law and in equity. There is no such rule at law, established by authoritative decisions in point. No such compensation is known to have been given at any time in *Virginia*, with the sanction of the Supreme Judicial Tribunal; nor in England, in any case. Indeed, there is no case in England, where any personal remedy has been allowed upon a mere real warranty. The declaration of Chief Justice PARSONS, of *Massachusetts*, that an action of covenant would lie in such case, for which he cites two cases from *Brownlow's Reports*, seems to be a mistake; for, in both those cases, the actions were founded on express covenants to save the lessee harmless, &c. Nor do I perceive any thing in those

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1823. cases, which can justify such an inference. On the con-  
*December.* trary, the common law and all its analogies forbid the re-  
 recovery, in such case, of more than the value of the land  
 at the time of making the warranty.  
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To ascertain this, we must enquire, what was the real import, at common law, of a contract to *warrant* upon a conveyance of a freehold estate; the measure and mode of compensation, when the warrantor failed in the performance of his contract, and the reasons upon which such measure was adopted. *Warrant* was a technical term, having its own peculiar signification, and without the use of which, the contract, imported by that term, could not be created, unless in cases in which the law implied the contract. *Co. Litt.* 384, *a.* The import of the word, when applied to freehold estates, was "that the warrantor would, upon voucher, or by judgment in a writ of *warrantia chartæ*, yield other lands and tenements to the value of those that shall be evicted by a former title." *Ibid.* 365, *a.*, and 366, *a.* The contract to *warrant* had the same effect in all respects, as if the party had contracted in the terms of this definition, if such a contract were allowed, and the specific execution of it could be enforced. *Co. Litt.* 366, *a.*; *Ibid.* 389, *a.* Such a contract was not permitted in relation to any interest, other than freehold, because no other interest could be claimed in a real action; and voucher lay in none but real actions, except in cases of wardship. *Co. Litt.* 101, *b.* The writ of *warrantia chartæ* also lay only for a tenant of the freehold, and was only used when voucher did not lie, because the tenant was not impleaded, or because he was impleaded in an action in which it was the policy of the law to prohibit delay, and therefore forbid the voucher; and it lay in such cases, only because the voucher did not lie. *Vin. Abr. tit. Warr. Char. D.* It was then supplementary to, and in *lieu* of, voucher. If the word *warrant* was applied to chattel interests or personal property, it operated as a personal covenant for the title, not because such was its strict technical mean-

ing, but because, although improperly used, (as it could not have its technical effect, and the parties intended that it should have some effect,) it must have that of a personal covenant, or none. This recovery in value, could only be had upon voucher or *warrantia chartæ*, its substitute, and only in lands or tenements; and if the warrantor had no lands or tenements at the time of his entering into warranty, (that is, appearing on the voucher, and taking upon himself to warrant by defending the suit,) or, at the time of suing out the writ of *warrantia chartæ*; or, if the tenant failed to vouch, or to sue out his *warrantia chartæ* before he was evicted, he was wholly without remedy upon his warranty. *Bac. Abr. tit. Warranty, M.*; a proof, that it had in no case the effect of a personal covenant. There is, however, one case mentioned in *Coke Littleton*, 102, b, in which the warrantor might be personally responsible in some form. But, if he was, it was on account of his wrong in voluntarily defeating the effect of his warranty, by alienating the lands which he had specially bound to warranty.

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In enforcing the covenant of warranty, the law was thoroughly settled, that the recovery should be of lands and tenements of the value of the lands warranted at the time of the warranty made, without regard to the increased value at the time of eviction, by the discovery of mines, buildings or other improvements, or by any accidental accessions, as in the case of the warranty of a wardship, and a new inheritance afterwards falling to the ward. *Vin. Abr. tit. Voucher, T. 6, passim.* And this benefit the warrantor had in all cases, unless he lost it by omitting to aver in his pleadings, that it was, when warranted, of less value than at the time of pleading; which was, (if he could have pleaded it and failed to do so,) an admission, that the value remained the same as at the time of the warranty. But, if he could not have pleaded the fact, the judgment was according to the value at the time of the warranty; as, if the voucher demands the lien and demurs upon the

1823. cause shewn, and it is adjudged against him. *Vin. Abr.*  
*December. tit. Voucher, U. 6;* or, if the land becomes of greater  
 value after entering into warranty; in both cases, the judgment was for the value at the time of the warranty made, because he was in no default, since he could not put the fact in issue. And so favorable was the law to this measure of compensation, that "if the vouchee enters into warranty, and takes by protestation the value of the land," (at the time of the warranty made,) "the protestation shall serve him for the" (real) "value" (at the time of the warranty made,) "though the plea be found against him." *Co. Litt. 126, a.* After the statute's authorising the recovery of damages in real actions, upon a *warrantia chartæ*, the warrantee having recovered a judgment *pro loco et tempore*, if he were evicted and damages were recovered against him to the value of the rents and profits, he might, upon a *scire facias*, enforce his judgment for lands of equal value, and for the damages assessed against him for the rents and profits. *Vin. Abr. Warr. Chartæ, pl. 5, N., pl. 7, N.; Ibid. Voucher L. 6, 4, pl. 5, N.; Ibid. Damages, P. pl. 12;* without regard, I presume, to any sum which he might *recoup* against the damages recovered on account of improvements put upon the estate by him. For, in all cases, the tenant was entitled to *recoup* the value of such improvements against the damages which might be recovered against him. But, if the value of the improvements exceeded the rents and profits, he had no remedy for the excess; for, it was his folly to expend in that way, more than the value of the rents and profits. *Vin. Abr. Discount, A., pl. 3, 4, 9, 10.* Upon voucher, the recovery of the tenant against the vouchee, was to the same extent as to value and damages. *Vin. Abr. Damages, R., pl. 2, G. pl. 13; Ibid. Voucher, A., a, pl. 1, pl. 2.* Indeed, the damages were given when the vouchee entered into warranty directly against him, he being, even in form, the defendant or tenant to the *præcipe*. The value of the land lost by the tenant, and of that recovered of

the warrantor, was fixed by ascertaining the issues beyond reprises. *Reeves's History of Common Law*, vol. 1, p. 443. I should not have thought it necessary to add any thing to shew, that the value of the land warranted, as it was at the time of the warranty, was compensated in lands and tenements, according to their value at the time of the eviction, if it had not been suggested, that the lands and tenements recovered were valued also, according to their value at the time of the warranty, without regard to their increased or diminished value since. Such a rule would have been most uncertain and unjust. The warranted lands lost might have doubled in value, whilst those recovered might have lost half their value; or, those recovered might have increased four-fold as much as those lost. Besides, an *advowson* was liable to be taken in value, the value of which must be perpetually fluctuating. Upon examining *Rastall's Entries*, I find a great number of forms of the writ of *habere facias seisinam ad valentiam*, all of which direct the Sheriff to deliver lands of a certain annual value, as they are at present, and there is no form directing the Sheriff to ascertain the value, as it might have been at any time before.

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Thus, it seems, that the utmost amount of the value of the recovery which a purchaser could have against the vendor upon his warranty, was the value of the land at the time of the contract, and the damages for which he might be responsible to the successful demandant; and, that as to his improvements, he was entitled to *recoup* them against the damages for which he was responsible, to the amount of the damages; but, for the excess, if any, he had no remedy.

The case of an exchange may be supposed to be an exception to these rules; but, it is not every exchange implied in law a warranty, 4 *Co. Rep.* 221, by which the land given in exchange was specially bound to warranty, and also a condition, so that, if evicted in part or in whole, the party might enter into all the land given in exchange, for

1823. the condition broken; or, if evicted in part, he might  
*December.* vouch, or sue his *warrantia chartæ* for a compensation in  
 value, out of the lands given in exchange, to the amount  
 of the value of that lost, upon the ordinary principles of  
 recovery in value.  
*Stout*  
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*Jackson.*

Thus stood the law in England when Virginia was settled, and is now our law, unless there be something in the circumstances of our country which makes it unfit for our situation, or unless our statute laws have abrogated it. There is nothing in our situation which ought to vary the law, since that law is nothing more or less than the execution of the contract, according to the terms agreed upon by the parties; and I think, as I shall presently shew, that the common law, as to the measure of compensation in such cases, is founded on good reason, and conforms to the spirit of the same law in other cases. We have no statute which can be supposed to affect this question, except that of 1734, which, "for the more easy prosecution of real actions," takes away "all essoins, views and vouchers." If this statute abolished the remedy by *warrantia chartæ* as well as voucher, it would be equivalent to a prohibition of a contract of warranty, since all the remedies for enforcing such a contract would be taken away; and a warranty, since that time, annexed to a freehold estate, would be, to all intents and purposes, a personal covenant, on the same principle that it always was personal, when used in relation to a chattel interest or personal property. But what, in that case, would have been the fate of contracts previously made, in respect both to the remedy and the measure of compensation? That remedy was not prohibited either by the terms or policy of the statute; the sole object of which was, to benefit the demandant in real actions, by making the proceedings more easy and simple, and by avoiding delays, as appears from the whole context of the law. The Legislature could not have intended to take away incidentally a beneficial remedy, which did not interfere with the policy of the statute. The *warrantia*

*chartæ* did not embarrass or delay the demandant in the prosecution of his right. If this remedy were abolished, irremediable injury might be done to the warrantee; for, upon a personal covenant to warrant, no remedy could be had until the tenant was evicted. Cases may arise, in which, after conveyance, a fatal defect in the title may be discovered, and it may be many a year before the adverse title is, or can be asserted, (as, if it be a title in reversion or remainder,) and in the mean time the warrantor may waste his entire estate. Upon a personal covenant, no available remedy could be had in such case. But, a writ of *warrantia chartæ* might be sued out immediately, and all the lands of the warrantor would be bound from the suing out of the writ, no matter into whose hands they afterwards went. The existence of this remedy was not inconsistent with the policy of the statute; and the abolition of voucher did not necessarily abolish the *warrantia chartæ*, but, on the contrary, made it applicable to all cases of warranty. For, as by the common law, that remedy existed as a substitute for voucher, only in cases where voucher would not lie, because the tenant was not impleaded, or because the policy of the law prohibited voucher, for avoiding delay in particular cases; so, when our statute prohibited voucher in all cases upon the same principles, the *warrantia chartæ* remained as the substitute for voucher in all cases. Nor is there any thing in the situation of this country, which would render this remedy inconvenient, except that the issues of property here are not, as in England, a just criterion of its value; and that would justify a modification of the remedy, so far as to ascertain the value of the property warranted and of that recovered in value, by its gross value in money, instead of resorting to the profits as the standard; as, in the case of *waste*, although the general principles of the common law remain with us, yet their practical application is varied according to the circumstances of the country, so that what is waste in England, is not, therefore, of course,

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waste here. *Findlay v. Smith, &c.*, 6 Munf. 134. If, then, this remedy remained, a party *warranting* a freehold must be considered as using the word in its proper and technical meaning, and to bind himself no otherwise than such a contract bound at common law. I should, therefore, doubt, whether a personal action of covenant would now lie on a real warranty; except in the case of the recovery of a chattel interest against the purchaser, as to which the covenant would be personal. *Vin. Abr. Covenant L. 7, pl. 1*. But, on this point, I give no opinion; as, in this case, the covenant was, in its terms, both real and personal. If a covenant of warranty binds executors in terms, or embraces personal property with real, or stipulates not only to warrant, but also to "defend;" in the two first cases, the terms of the contract are inconsistent with the effect of a real warranty, and, therefore, must have been intended as a personal covenant. *1 Ves. 516*. In the last, the word "warrant" would be construed technically, so as to bind the warrantor to compensate in lands or tenements of equal value, upon voucher, or *warrantia chartæ*. The word "defend" would be considered as making a personal covenant equivalent to a covenant for quiet enjoyment. *Vin. Abr. Voucher B. pl. 6*. But, these two covenants would have the same effect as to the amount of compensation, except that in one case it would be made in lands, and in the other in money. The object of both is the same; to ensure the perpetual use of the property, or, in case of failure, to make a just compensation; and the damages arising from the breach of the contracts, would be identically the same; for, both would be broken at the same instant of time. If, upon principles of law and justice, the measure of compensation in the one case was the value at the time of the sale, so was it in the other case. The pure warranty, the covenants of seisin, of power to convey, and for quiet enjoyment, having the very same object in view, that is, to ensure the perpetual enjoyment of the thing, or to make a just com-

pensation, and, in the case of eviction, the damages to the purchaser being precisely the same; and falling upon him at the same time, and under the same circumstances, the compensation, in justice, ought to be to the same value, whether made in real or personal property.

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But, admitting that *warrantia chartæ* as well voucher were abolished by the statute, or that they are prohibited by any policy arising from the circumstances of the country, or that any other consideration justifies now the allowance of an action of covenant, or a *warrantia chartæ*, at the election of the party, it would follow that the same measure of damages or compensation should be adopted, whether the action were in the one form or the other; for, precisely the same reasoning as to the intent of the parties, and as to the effect of a breach of the contract, would apply to both cases. Otherwise, the strange injustice would follow, if the old remedy was abolished, that the mere substitution of a new remedy would vary the substantial rights of the parties; and the first recovery on the new remedy might, upon a contract in the same words, be three or four times the value of the last recovery on the old remedy. The Legislature, if *they* abolished the old remedy, or the Courts, if *they* abolished it, would, in effect, in such case, make a new and different contract for the parties; unless, upon the new remedy, the same compensation, in substance, were given; or, if both remedies existed, and the party had his election to pursue either, then, by the mere authority of the Court by which this new remedy would be given, the party might recover twice, or even in some cases, ten or twenty times as much in value, upon the new remedy, as he could upon the old. This, indeed, would be to *Legislate*, and not to *administer* the law.

This view of the subject would probably not be doubted, unless upon the supposition, that the English law upon the subject of warranty, was founded in principles peculiar to the feudal system. Whatever influence those principles may have had in establishing the rule, that the com-



1823. December. *Stout v. Jackson.* compensation should be in kind, there was nothing in them which could influence the question as to the *quantum* of compensation. That was a question of mere justice and policy; and it was decided strictly according to the general principles of justice and policy, which pervade the whole body of the English law. Whatever may be the extent of the obligations of natural law, no system of municipal law has ever enforced them, in all their consequences. The quiet and well-being of society require, that the rights and responsibilities of individuals should in all cases, when it is practicable, without the hazard of extensive injustice, be ascertained by fixed and certain rules, so that they may adjust their differences, without a resort in each particular case, to the judicial tribunals. It is no objection to such general rules, that in some few instances they will operate injustice. If their general effect is, to do right between the parties, it is better that individuals should suffer occasionally an injury, than the whole community an inconvenience. This principle is strongly asserted and insisted on by the common law. If, by the law of nature, every man was bound to make good all damages, which arose from his failure to perform his contract, even if aggravated by accidental events, which he could not foresee or control, (of which I doubt,) yet the common law condemns a claim to such aggravated damages, by the maxim, "*summum jus, summa injuria.*" That law considers the state of things at the time of the contract, and holds the parties bound to compensate for all damages which are the natural consequences of the breach of the contract, and which the parties could reasonably be supposed to foresee, and have in their contemplation, and, therefore, to have contracted for. *Vin. Abr. title Value; 4 Johns. 1, and the cases there cited; Vin. Abr. title Covenant, 4, 2, pl. 4: See 1 Domat's Civil Law, 407.* If such damages are aggravated by other accidental causes and circumstances, not necessarily connected with the violation of the contract by the party, and which could not

reasonably be anticipated by the parties, they cannot be considered as having contracted in relation to such circumstances; and the damages to the party injured, arise not solely from the breach of contract, but, in part, from other causes, over which the party has no control. For, although without the breach of contract, these aggravated damages would not have arisen, yet, without the existence of those circumstances, the breach of contract would not have produced such aggravated damages; so that both causes combined to produce the damage. If either had been absent, the aggravated damages would not have occurred; and, in justice, the party failing in his contract, is only responsible for the proportion of the damages of which he is the cause. The failure to pay punctually a debt, may be one cause of the failure and ruin of a merchant; but, the circumstances in which he was placed at the time, were another, and a necessary cause of his failure. Yet, as in general, the debtor cannot be presumed to know those circumstances, he is not responsible for the mischief arising from them; although, without his failure in his contract, these circumstances would not have had such effect, and this even if he was apprised of those circumstances, and knew the consequence of his failure. He would be bound by the general rule of law to pay interest for his delay, and the other party would bear the particular injury to himself, rather than the whole community should suffer a particular inconvenience, by abandoning a beneficial rule of law.

The cases of contracts for the delivery of stipulated quantities of personal property, which notoriously fluctuates in the market value, at a future period, and upon the breach of which the party is responsible for the value, at the time of his failure, have no application to the question under consideration. For there, from the nature of the contract, it is certain this fluctuation was in the contemplation of the parties, and that they intended to take the hazard of a rise or fall in the price. This consideration would influence the terms of the contract; and the vendor

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1823. would, in fact, get a compensation for the hazard which  
*December.* he took upon himself. As to the measure of compensation, I can see no reason for a difference between an *executed* and an *executory* contract, except so far as from the nature of the contract, it appears what the parties stipulated for, or had in their contemplation, in the event of a failure to perform the contract. It was upon such reasoning as this, I presume, that the measure of compensation, in case of a warranty, was fixed at common law; for, upon the same reasoning, in all other cases, the law prohibits the recovery of speculative damages. Thus, on covenants to convey to another, at a future time, a tract of land, for a given price, and, before the time for performing the contract, the estate increases in value, but it is feared that the vendor has not a clear title; the purchaser can only recover the money paid, and interest; for, this is his real loss, and all the rest is speculative. *Flureau v. Thornhill*, 2 W. Black. 1078. In such a case, his loss is in fact the same, in respect to the increased value, as if the estate had been conveyed at the time of the contract, and he had been evicted at the time appointed for the execution of the contract.

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To apply these principles to the case at bar. Upon a contract for the sale of land, all the facts known to the parties, as to its present and probable future value, enter into the consideration of the price. If any accidental circumstances, not foreseen, should enhance the value, that could not have enhanced the price, and the purchaser cannot be properly said to have purchased the advantage arising from such circumstances, or the vendor to have sold and warranted it; and in case of eviction, it cannot be said that his loss, as to the increased price, arose solely from the failure of the vendor. For, without these circumstances, that increased value would never have existed. The loss of his purchase money, and of the rents and profits for which he is responsible to the true owner, is all the loss which necessarily resulted from the violation of the con-

tract, or failure of the title. As to improvements made by the purchaser, in general the vendor cannot foresee that such improvements will be made, beyond what is necessary for reaping the profits of the property; and if so, such improvements could not, in general, exceed, or even be equal to the rents and profits. And to that extent the purchaser would not lose them, as they would be set-off against the rents and profits for which he may be responsible. If they exceeded that measure and the vendor was responsible, then the contract, in effect, would amount to an agreement that the responsibility of the vendor should be graduated by the whim, or folly, or pleasure of the purchaser. In the case under consideration, the sale was made when we had a sound circulating medium. The eviction happened, when peculiar and accidental circumstances, affecting the community at large, had rendered the price of every thing literally speculative; and it is probable that the land now, is of no more value than at the time of the purchase, unless valuable improvements have been made upon it. If such were made by the purchaser, they were made in his own wrong, and with the full knowledge of the adverse claim. If the vendor were responsible for the increased value, he would be liable in consequence of accidental circumstances which were unforeseen, did not influence the price, were not in the contemplation of the parties, and over which he had no control. And the extent of his responsibility would depend upon the accident, whether the owner asserted his claim sooner or later, and whether the suit was speedily disposed of, or long protracted. A rule, the effect of which depends upon so many accidents, cannot be either just, or founded upon any good policy. I agree with Chancellor *Taylor*, in *Lowther v. The Commonwealth*, 1 Hen. & Munf. 202, that the warranty extends only to what is sold and paid for, and not to those accidental and fluctuating advantages, arising out of circumstances which continually change, and which may enhance the value to-day, and depress it in an

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1823. equal degree to-morrow; nor upon the act of the purchaser himself, in making improvements for which the vender received no consideration. And that idea is strongly countenanced by the form of the plea of the voucher, where buildings have been erected "he should show the special matter, and enter into warranty for so much as was at the time of making the deed, and not for the residue." *Godb. Ballet v. Ballet.*

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The result is, that the measure of damages is, and ought to be the same, in case of eviction, whether they be claimed in an action upon a warranty, or covenant of seisin, or of power to convey, or for quiet enjoyment; that this measure was settled by the common law, upon principles of justice and sound policy, to be the value at the time of the contract, without regard to the increased or diminished value, or to improvements; and the rents and profits, for which the tenant is responsible to the successful owner; that as to any rents and profits, for which he may not be so responsible, the vendor would not be responsible, since the purchaser would have enjoyed them by virtue of his contract; and as to his improvements, if reasonable, they will be discounted against the rents and profits; if not, the vendor should not be responsible for them, and so the vendor cannot, in any case, be responsible for improvements; and that, with us, the value ought to be ascertained, (owing to the circumstances of our country,) not by the English rule, according to the issues beyond reprises, but according to the value in gross, the best standard of which is, in general, the price agreed upon by the parties, at the time of the sale. And, that when it does not otherwise appear what was the value of the rents and profits recovered from the purchaser, or for which he may be responsible, interest upon the purchase money from the time that such responsibility for rents and profits existed, should be given in lieu of the rents and profits. In this case, such responsibility commenced upon the original entry of the appellee into the land, and the rents and profits are not as-

certained. But, as the purchaser never enjoyed the land for any time, by virtue of the deed, he should have interest on the purchase money from the time he paid it.

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These views apply only to cases of sales made *bona fide*, and to a remedy by an action founded on the contract. The case of a fraudulent vendor would be subject to other considerations, in an action on the case in the nature of a writ of deceit.

The judgment should, therefore, be reversed, and judgment rendered for \$800, with interest at 6 *per centum per annum* from September 22nd, 1809, and costs, subject to the credit admitted by the parties.

Judge COALTER.

The first objection is, that no action of covenant lies on the warranty, the remedy being by *warrantia chartæ*, or by suit in Chancery, or action on the case to recover the money paid, the consideration having failed.

I have not had it in my power, not having access to the necessary authorities, to investigate fully, this ancient and obsolete doctrine of *warrantia chartæ*.

In *Coke Littleton*, 365, note 1, by the editor, I find the origin of this doctrine stated. It is there said, that according to the civil law, the purchaser may call on the seller to warrant, who was substituted as defendant, and the purchaser might leave the defence to him, or defend with him, or if evicted, he had a claim upon the warrantor for complete indemnification. The precise sum is sometimes agreed on by the parties in their contract; but penalties of this kind are not encouraged, and it is in the breast of the Judge to moderate or increase the sum; but it cannot be increased, either by express contract or by equity, to more than double the property evicted. The warranty in England, it is said, is of feudal extraction, being derived from the obligation the Lord was under to defend the tenant's title to the land, and if evicted, he was bound to

1823. make him recompense, by giving him lands of equal value to those evicted.

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In *Hobart*, 22, it is laid down, that *warrantia chartæ* will lie upon all actions real, and may be brought either before or hanging those actions, though voucher only lies in the actions; and this, though he may vouch in the action that is brought against him; and if he recover, or afterwards lose in the action wherein he voucheth, he shall have a writ of *habere facias ad valentiam* within the year after recovery in *warrantia chartæ*, though he cannot have execution until he take loss. And this is the safest course, because he shall bind the land from the *teste* of the *warrantia chartæ*; whereas, in the other case, it is only bound from the time of the voucher; and it is also there laid down, that though he bring *warrantia chartæ*, he must not rely on that alone, but must also vouch, and request plea according to his case.

If this covenant was in the form of a pure warranty, I doubt whether *warrantia chartæ* lies in this State since 1734, when voucher was done away by our statute, 4 *Hen. Stat. at Larg.* 403; and if I am wrong in this, yet since that statute, and considering the entire disuse of that ancient remedy, its incompatibility with the situation of this country, and the forms and manner of conveyancing here, I am persuaded that no one, at this day, considers that the use of a set of words, differing but very slightly from another set, will entirely alter the nature of the liability of the vendor, on the one hand, or of the rights of the purchaser on the other, in case the covenant to warrant is broken; and that the general sense of the country, and sound principles of justice, therefore, require, that all covenants of this kind, however worded, should be considered, as to the remedy in case of eviction, as personal covenants by the vendor; that is, that a personal action of covenant will lie on such warranty.

But, if I am in an error as to this, the warranty here is not in the usual form of a pure warranty, but it is a cove-

nant, "that he will warrant, and forever defend, against all persons, and all claims whatever, and that he has full power and authority to convey, clear of incumbrances." Now, the verdict finds, that there was a claim, against which he could not, and did not defend, although it is true he conveyed the legal title to the plaintiff, the adverse claim being of an equitable nature.

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This, too, is a bargain between two citizens of Virginia, for a sale of lands in Ohio. A *warrantia chartæ*, voucher, &c., I presume, could not lie between these parties in Virginia, on a sale of lands in Ohio; and there is no proof that it would in Ohio, even if they lived there, or that such remedy exists there. Besides, how could a citizen of Virginia be vouched there? And, if he is not warned, though the tenant may lose the land, he cannot recover in value against the vouchee. 2 *Saund.* 32. And, what has also great weight with me, is this: A personal action of covenant may be brought on a real covenant of warranty, where the party, neither by voucher, nor *warrantia chartæ*, can have recompense; as, where the disturbance or eviction is by a lease for years. 2 *Brownl.* 158; *Hob.* 28. There must be a suit against him, and an eviction at law, at least of an estate for life. Now, if he could neither vouch, nor bring *warrantia chartæ* in this State, of lands lying in Ohio, both parties living here, then the personal action lies. But, again; if the lands lay here, the eviction is not by a suit at law, but bill in Chancery; and, I have seen no case, nor do I believe any can be found, of voucher in such suit, or of an execution *ad valentiam* on a *warrantia chartæ*, where the recovery of the land has been by bill in equity. It was then a mere personal covenant, or must be treated as such, as much as if it had been a lease for years, or, as in the cases referred to, where the only remedy was by personal action.

The next question, which relates to the proper measure of damages, is a very important one, and has never been directly decided, that I can discover, in this State.



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But, it is said, that however this point may be, in general, here the defendant, though he had the legal title, and made a deed to the plaintiff, yet nothing passed by the deed, as another was in possession; and the possession was afterwards wrongfully acquired by the plaintiff, as the covenant was broken the moment the deed was executed; and, therefore, he is only entitled to the purchase money, with interest. I confess, I do not clearly perceive the force of this argument, even admitting this statement of the case; or, how it is, that a man who conveys, and covenants that he has a good right to do so, can urge, in extenuation of damages, that his conveyance operated nothing, and that he had no right to convey, although he expressly covenants that he had. And, though the purchaser may have had such notice of this equity, as to postpone his legal title to the claim of him holding that equity, yet the appellant must be presumed to have assured him, that there was no valid outstanding claim, as his warranty and covenant, that he has a good right to sell, clearly indicates. He, therefore, cannot shelter himself under an alleged improper purchase, by the appellee. He is estopped to say, that his deed passed nothing. If he could be urged in any way, it ought to have been pleaded as a foul contract between both parties, that both were guilty of champerty and maintenance, and that, therefore, no action at all lay on the deed. Nor, can the appellant, as it appears to me, urge that *Jackson*, the appellee, did wrong in getting possession. He did no wrong to him which he could sue for, or set-off in this action; and, if he did wrong to others, that demerit in him gives no merit to the appellant.

But, how stands the fact? From the verdict, and the facts agreed, it appears, that one *Martin* held the legal title; that the appellant, *Stout*, as early as 1805, and long before he got a deed from *Martin*, sold the land to one *Hollenback*; but, whether he had then purchased, or paid *Martin* for it, does not appear. *Hollenback* sold to one

*Claypole*, who took possession. After this, *Claypole* surrendered the possession to *Martin*, who held the legal title, and claimed the land, (probably not having received the purchase money,) without the knowledge of *Hollenback*. Now, I apprehend, that the lawful owner, getting thus into possession of his own land, could not be guilty of wrong, either in Ohio or Virginia. It appears, however, that after this, *Claypole*, who was probably left in possession by *Martin*, (though that is not expressly stated,) without the knowledge or consent of *Martin*, delivered possession again to *Hollenback*, and took a lease from him.

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In this situation, *Martin*, ignorant of these transactions, conveyed to *Stout*, on the 22d of September, 1809, believing himself in possession, by his tenant, and *Stout*, on the same day, to *Jackson*. We know not what the law of Ohio, on this subject of possession by *Claypole*, is; it is not found. But, it is believed, that the law of no civilized society, would declare such a deed void, so as to prevent the title from passing. This is not a case of defect of title at law. The legal title passed, but there was an outstanding equity; and, if there is a distinction between a warranty of seisin and a warranty for quiet enjoyment, (which, I confess, I am not casuist enough clearly to perceive,) this is a case in which the legal title passed, and the party could not sue for a breach of covenant, until ousted by reason of this outstanding equitable title.

What, then, did *Jackson* do? Being the lawful owner, he went on the land, as every lawful owner has a right to do, and, by peaceable means, acquired the possession. From this, he has been removed, in the year 1813, by a decree of the Supreme Court of Ohio.

The verdict finds damages for the plaintiff, according to the value of the land and improvements, at the time of eviction, to the amount of \$2,937 50 cents, with interest from that time, in case that ought to be the standard of damages; and \$800 with interest from 1809, if the purchase money is the proper standard; which question is

1823. submitted to the Court. If the law of Ohio ought to govern the case, and would operate in favor of the appellant, it has not been found; and whether the increased price or value arose from the general rise of lands in Ohio in the year 1813, or from large improvements made by the appellee, if this last circumstance ought to vary the case, is not found. It appears from the verdict, that *Jackson* leased the land to *Claypole*, and it not being found that he removed to it himself, the probability is, that *large improvements* had not been made. I see nothing, therefore, which will enable me to view this case otherwise than as the law would stand between two citizens of Virginia, on a sale and eviction of lands in Virginia, where, between the time of sale and eviction, lands, from general causes, have appreciated in value, and which lands may also have been rendered somewhat more valuable by such improvements as a tenant, in the course of three or four years, might be supposed to make. In other words, and as a general proposition applicable to all cases of this kind, is the purchase money with interest, or the value at the time of eviction, to be the standard?

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My present opinion is, that the latter is to be the standard. It is true, that if the loss has been greatly increased by a large expenditure of money beyond what a prudent and just man ought to make, according to the circumstances of the case, there might be some difficulty in doing exact justice to both parties. Indeed, it must be admitted, that whichever standard is adopted, entire justice will not always be attained. Nothing is found in this case, and I must presume, therefore, that nothing exists, to vary it from the general proposition above stated.

This question has been differently settled in different States. If I err, therefore, I have the consolation of being supported by those, who, under a similar state of things, have thought as I do; and as the law in this State will not be settled in this case, I will have an opportunity to abandon my present opinion, if, with better lights, I shall see

cause to do so, whenever this important question shall again come on before a full Court.

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This is an action of covenant; concerning which, it has been well observed, "that as the good of society requires a punctual performance, and that no person should be allowed to *rescind or break through his contracts*, so the law has provided a remedy, by action of covenant, in which the injured party is to recover damages for the violation of the contract, *in proportion to the loss he has sustained.*" *Bac. Abr. tit. Covenant; 3 Black. Com.* 157.

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In this action, then, the general question is, *what loss has the party really sustained?*

But, we are told, that this is an action of covenant on the sale of real estate in fee simple, and that it is brought on the deed of conveyance itself, and that whatever may be the law of this action of covenant generally, as to sales of personal property, or in other cases, such as leases for years, &c., and the loss *really sustained* in such cases, by reason of the breach of such covenants, yet, as anciently a party to whom lands had been conveyed in fee, might bring his *warrantia chartæ*, we must see what he could have recovered in that action; and although that action has been out of use for a century, and the covenant, at least as regards this deed, is a mere personal one in this respect, yet the remedy is to be varied and the damages assessed, according to the nature of the recovery, in that obsolete action. This will be proper, if that remedy, founded on ancient feudal doctrines which have long since passed away, and which never existed here, gives a proper and just rule in regard to those who contract for a personal covenant and for a just remuneration, according to the principles consequent on such an undertaking; otherwise, not.

I cannot, at present, bring my mind to acquiesce in the doctrine, that it does give the correct rule. That remedy had its own law, founded on feudal and obsolete reasons. It gave nothing, for instance, when the vouchee had no

1823. lands, however wealthy in other respects. If the lands,  
 December. too, recovered on voucher, were afterwards evicted, so  
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 Stout that, in reality, there was no satisfaction, the remedy was
 v. at an end, &c.
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All these doctrines, doubtless, suited the feudal times. But, suppose a man sells lands, receives the purchase money, and puts the purchaser into possession, under a covenant to convey, and before conveyance, there is an eviction by title paramount; no *warrantia chartæ* lay in such case, there would be then no such standard to compare by; and what then would give the rule?

But, I am not fully satisfied, that, testing the question by the nature of the recovery in this ancient action, except as to increased value, by reason of improvements, I should not be supported thereby. If the warrantor, on being vouched, enters into warranty, generally, that is, makes defence, without saying any thing more, he will be held to warrant, according to the *then* value; but, if the estate is more valuable, *by reason of improvements*, there he can plead that matter. If, however, this is not the case, I have seen no case which goes to shew, that he can allege that, *from general causes*, the land has become more valuable, and that for *that cause*, he is not bound to enter into a general warranty. I believe no such case can be produced; but, on the contrary, that, by analogy to cases I shall produce, he could not.

To simplify my ideas, on this subject, I will suppose, that A. has thirty acres of land, unimproved, each acre of equal value, say \$100; and sells ten of them to B. for \$1,000. They all remain unimproved, until B. is evicted; at which time, from general causes, they have appreciated in value, and are then worth \$200 each acre. Will B. get only five acres of the twenty adjoining, and yet held by A., or ten acres? If the latter, as I apprehend he would, then he gets land worth \$2,000 at the time of eviction, though he gave but \$1,000 for that evicted.

But, suppose, from a counter current in human affairs, the lands were worth only \$ 50 *per acre*, at the time of eviction; would he get the remaining twenty acres, worth only the \$ 1,000, or only ten acres, worth as much as the ten he lost? I apprehend the latter.

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Assignment of dower is a warranty in law, and so is an exchange or partition of lands. 2 *Saund.* 38, *b*, note 5; *Co. Litt.* 384, *b*. If a widow is sued, she may vouch; and, if she is evicted of her dower, she will recover one-third of the remaining two-thirds. In every exchange, lawfully made, this word *excambium* importeth a warranty, and also a condition. 4 *Co. Rep.* 121, *Bustard's Case*. The latter gives re-entry, and the other voucher and recompense; and this in respect of the reciprocal consideration, one land being given in exchange for the other; but, it is a special warranty on the vouchee, and, therefore, the voucher shall not recover other lands in value; and the same law is in case of partition. Hence, it follows, that if three acres are given for three acres, and one is evicted, the condition is entirely broken, and the person evicted may re-enter for the whole; but, if he vouches, he shall recover in value but according to the loss. In partition, however, if each parcener has three acres of equal value, and one is evicted of one acre, having prayed in aid the other, she will only get half an acre, so as to make all equal. So, if three acres of equal value descend, and the heir endows the widow of one, and she is impleaded, and vouch, and is evicted, she will recover only the third part of the two acres. But, in case of exchange, each party is a several purchaser, and each warrants the whole to the other; and, therefore, he shall recover to the value of what is lost.

Let me ask, whether it would have been tolerated in either of these cases, for the vouchee, or the parcener, who was prayed in aid, to say, "true, you are impleaded, and may be evicted; it is also true, that your lands have appreciated, from general causes, as well as mine; but, if you

1823. are evicted, I insist, that your lands shall be valued at the
December. time that the exchange or partition was made, or the dower
 assigned; and that I shall compensate you out of the lands
 I hold, at their present value. They are now worth double
 what they were then; and though you gave me three
 acres for the three you may be evicted of, and which are
 now of equal value with the three I hold, yet, I will com-
 pensate you for the loss of the three I gave you in ex-
 change, by one half of what you gave me?" Would the
 dowress, and parcener evicted, also receive their satisfac-
 tion in the same way?

But, the party, in the case of exchange, could re-enter
 for the *whole*, and this by the same law which, by the
 other remedy, it must be contended, would only give him
one-half.

I incline to think, therefore, that the vouchee must en-
 ter into a general warranty, unless when he can plead,
 that the lands sued for have been *increased in value by
 improvements*.

But, the case cited from *Johnson's* New York Reports,
 admits, that in an action of covenant, there can be no dif-
 ference as to increased value, whether arising from general
 causes, or improvements. If the law of *warrantia
 chartæ*, however, was different from what I suppose (con-
 cerning which, I shall not further dispute,) it might have
 been justice in feudal times; but, it was not the kind of
 justice dispensed by the civil law, which, I think, affords
 a standard better adapted to our times, and to the office of
 an action of covenant, as by it, *complete indemnification*
 was given; and ought not, therefore, to influence us in the
 decision of what is the proper standard of indemnifica-
 tion, in that action. Such a standard as that insisted on,
 I believe, has never been in the contemplation of parties
 contracting in this State; and, I think, I am justified in
 this belief, by the opinions (though they may be called
obiter,) of the Judges of this Court.

In *Mills v. Bell*, 3 Call, 320, which was on a bill for a specific execution and conveyance of land, a part of which had been recovered from the purchaser, Judge PENDLETON, speaking for the whole Court, says: "The first point which presents itself to the consideration of the Court is, by what ratio the compensation to be made to *Mills*, for the land evicted, is to be adjusted? Whether the value of them, at the time of eviction, or at the time the purchase was made? The former would have been the rule, if a conveyance had been made warranty; since the purchaser is entitled, on the covenant, to the increased value of the estate, as well as for any improvements he may have made on it. But where, as in this case, the contract is executory, a Court of Equity will adjust it, upon principles of equity, according to the circumstances; and, since *Mills* appears to have been faulty in his payments, which, if regularly made, might have prevented the loss, it ought to be adjusted, by proportioning the loss to the value of the whole purchase money for the whole land."

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No case of an action of covenant, on a warranty in a deed, in which this question has been made, has ever come before this Court, that I am aware of; not, I presume, because no such case has occurred, (for, I am told, they frequently do,) but, because the universal understanding, and justice of the country, has sanctioned the above opinion.

The same doctrine is laid down by Judge ROANE, in the case of *Humphreys v. M^cClanachan*, 1 Munf. 500, as settled in the case of *Mills v. Bell*. But, this was an executory agreement, as in the case of *Mills v. Bell*, and the value settled on equitable principles, according to the circumstances of the case.

So in the case of *Nelson v. Matthews*, 2 Hen. & Munf. 177, Judge TUCKER lays down the same general doctrine, admitted to be law in *Mills v. Bell*. But this was a case, not of eviction, but of a deficiency in the land; so that there being no land lost, *which could be seen and valued*, the average price *per acre* of the whole, was the only standard that could be resorted to.

1823. Since the argument, I have been referred to *Crenshaw*
December. v. *Smith & Co.*, 5 Munf. 415. I have examined the original record in that case and my note of the argument, and find the report of it is not as full as could be wished.

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The case turned on a title bond, set out in the amended cross-bill, which is not noticed in the report. The principal tract of land, which was the great, if not the sole object of the purchase, was conveyed by deed, with general warranty; the consideration expressed being £300, the whole purchase money stipulated for, as far as appeared in the cause. But the title bond extended, also, to lands adjoining, some of them, and possibly all, standing on inchoate rights. From this circumstance;—the peculiar phraseology of the bond as to these adjoining lands;—and from the will of *Crenshaw* directing this debt to be paid;—there was much reason to doubt, whether *Roberts* sold any thing more than *his* rights in this land, and it was of a part of this land that the alledged eviction had been. The case, then, was placed by the argument, on the ground, that the bill was to be considered in the nature of a bill for a specific execution, and as it appeared that the party could not convey the 100 acres, compensation ought to be made.

In this view, the case was one like *Mills v. Bell*, with this difference, that in this case there were doubts as to the propriety of any compensation at all.

The question now before the Court, was neither made in the argument, nor was it considered by the Court. The present, I believe, is the first case, in which that question has directly come before the Court.

I should not be governed by the *dicta* of the Judges in the above cases, if I saw good reasons to depart from them; but I do not. I cannot say, when a jury is called on to estimate what was the value, at a given day, of a particular tract of land, which a party has lost, and of course has lost something of that value, and has sustained damage to that amount, that an estimate of such value and loss can

be considered a mere speculative estimate of damage, so as to come under the doctrines on that subject. I do not understand, that either the civilians or our Judges have considered that the *real* damage which a man has sustained in such a case, cannot, with sufficient certainty, be ascertained.

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Suppose a part is evicted, which cuts off the only spring attached to the dwelling, and the most valuable part of the land and improvements, both absolutely necessary to the enjoyment of the residue, either for the purposes of comfort or profit. Is the average price to give the rule, or must not the intrinsic value of the land lost, added to its relative value to the residue of the tract, give it? And how can we carry this back to the date of the contract? The parties never fixed a value on the land, thus disjointed and cut to pieces. It cannot be said, this or that is the value they fixed to it in that situation. The jury must first *speculate* on what it is probable the purchaser would have valued it at, and whether he would or would not have purchased, under such circumstances, and then say that this was what he had agreed to give for it, before it can be said that this was the value fixed by the parties. This, I think, would be like *speculative* compensation, rather than fixing *real* damage. But, if the jury in this case, ought to fix the *actual* loss, by taking into consideration, not only the intrinsic value at the time of eviction, but its relative value also, (and I cannot see how, in justice, they could do otherwise; indeed, the Judges in *Nelson v. Matthews*, all concurred in opinion, that in such a case as I have supposed, the *actual* as well as *relative* value is to give the rule,) they may fix the value beyond the original purchase money of the whole; so that the plaintiff in this case, might possibly recover more for a part, than he would, had he been evicted of the whole, and the purchase money, the supposed value agreed on, had given the standard. We cannot combine the estimate of the value in such case, with the purchase money. All will then be doubt and

1823. speculative opinion. We must go for the average price
December. given, or for the real loss. I think the latter.

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But, suppose the purchase is of a house and forty feet in a town, not producing one cent of profit, except from the buildings, which have been consumed by fire before the eviction. Is the seller to make good this loss to the purchaser, by returning the whole purchase money and interest, not even having credit for the rents, or to pay only the value of the naked lot, which was all that the purchaser lost by the eviction, leaving him to stand his own insurer against accidents of this kind, or any other depreciation in value at the time of eviction? What does the purchaser lose? The property of a given value at the time of eviction, at which time the covenant is broken and action accrues.

Again; A. sells to B. 40 feet of ground in the Main street of Richmond, valuable only as a building lot, and *sold as such*. To make it avail any thing to the purchaser, he erects buildings, and is evicted. Has he only lost his purchase money and interest? Or, has he lost what the lot, with the buildings, would have sold for, the day after eviction? Certainly the last; and the only question then is, whether that is the real damage he has sustained in consequence of the bad title, and breach of contract on the part of the defendant? Could there be any doubt of his right to recover that, especially, if as in this case, such loss had not arisen from a paramount title, unknown to the defendant, but in consequence of a previous sale made by him? I think that would be the only safe and just measure of the injury in either case; but surely there could be no doubt in the latter. The vendor could not say, you ought to have waited for 20, 30 or 50 years, so as to be sure there was no adverse claim, before you occupied the property, in the only way you could occupy it, so as to make it of the value of one dollar to you.

It will not do to say, that such risque to vendors will put an end to the sale of real estates. If they do not wish

to encounter such risque, they can make a special warranty to return the purchase money only, or *pro rata* for the quantity evicted, and get a price in proportion; they are not to warrant a good title, get a full price, and then say they are not to make good the actual loss which the vendee sustains.

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What would be the proper estimate in case the purchaser, after notice of an adverse claim, goes on to make valuable improvements, or without such notice, lays out sums which no prudent man ought to expend, it is not necessary for me to speculate about. Extreme suppositions, out of the usual and fair course of human transactions, are not to vary the plain principles of justice, applicable to ordinary occurrences.

It would not be tolerated, for the vendee to prove, that at the time of the purchase, he could, with the same money, have purchased another tract of land, then offered to him, and which, even at the time of eviction, was worth so much; or, to say, that, if he had not been evicted, he would, at the *time of the trial*, and when he gets compensation, have sold it for so much.

These would be considered unjustifiable speculations, however clearly proved, and *non constat*, that he would have done either the one or the other. But, all will admit, that he lost property of a given value, at the time of eviction, and that he has, therefore, actually sustained damage to that amount, by the failure of the vendor to warrant and defend against the adverse claim, as he covenanted to do. To decide, that he shall not make good that loss, it has been very aptly said by the counsel, would be to annul, instead of enforcing the contract.

It appears to me, that the original price or value has nothing to do with the question; and, that much of the error in the arguments I have seen, arises from the supposition, that if a sum of money was given, that sum, *at least*, with interest, must be recovered. It is true, that the price may sometimes form a correct guide; as, when the purcha-

1823. ser, before entry, discovers a paramount title, and sues on
December. what is denominated the warranty of title or seisin; and
 { Stout
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 Jackson. thus, before there is any material change in the property,
 or he has sustained any loss, except parting with his money,
 brings his action. In such cases, the jury would give him at least his purchase money, and interest. But, where he has been put in possession, has made improvements, or has permitted improvements to dilapidate, or, from any cause, the lands are more or less valuable, his loss, by the eviction, is not his purchase money that he parted with on the sale. His loss is the real value of the property at the time of eviction. If he has been obliged to pay *mesne* profits, it is because he has received them; so, he has nothing to complain of on that score; and, therefore, I cannot see, according to the doctrines contended for, on what principle it is, that he is to get interest on his purchase money, except it be on the principle of annulling the contract, and restoring the party, as far as may be, to his former situation. But, can you do this at law? And, if you can, will it be justice to do it, without giving him his improvements? Suppose A. purchases of B. and is put in possession, and makes improvements; but, before he has paid all his purchase money, he finds B. cannot make him a title to a most valuable part of the land, near the improvements, and he applies to a Court of Equity to rescind the agreement. Is he to lose his improvements, which were made on the faith of a good title? It will not do to reply, that, in that case, the vendor gets the improvements, and ought to pay for them; for, it is the same to the vendee, whether he gets them, or another. His loss would have been the same, had they been erected on the part of the land evicted. Whether the vendor, or a stranger gets them, the damage is the same to him.

But, a Court of Common Law does not rescind; it enforces agreements; and, by an action of covenant, makes *full compensation* for the actual loss sustained by their violation.

The purchase money, or value at the time of the sale, may, or may not, be properly resorted to, according to circumstances, as affording a criterion of the loss sustained by the eviction; but, in my opinion, it will rarely give the just rule, because, the injury sustained must be adjudged of at the time the covenant is broken, and at which time action accrues. In this case, it was sustained at the time the appellee lost his land by the decree, and not before. He could not have sued his covenant before that time. He then lost his land, worth what the verdict finds; and, I am obliged, therefore, to affirm the judgment.

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Judge BROOKE.

The question that has been so elaborately discussed, is one of great importance; and, it is to be regretted that, there being but a bare Court, it is not to be finally settled in this case. No case has been shewn, in which an action of covenant has been sustained upon a technical warranty at the common law; and, if this were a warranty, in its strict sense, of lands lying in Virginia, it might be insisted, that this action would not lie. But, as the lands warranted, lie in another State, the laws of which are not found in the verdict, it may be inferred, that the parties used the term warrant, in the deed, in its vulgar, and not in its technical sense; and, that the action of covenant, upon general principles, was the proper action in this case. The covenant consists of two parts. First; a warranty of the title; and, secondly, that the grantor had power and authority to convey. It will be perceived, however, that the plaintiff has not, in alledging a breach of the covenant, treated it in any other light than as a covenant of seisin, at the time the deed was executed. Considering it as a warranty at the common law, great diversity of opinion has existed, as to what was the substantial recovery upon a warranty of that character; and, it is supposed, that, in an action of covenant, equivalent damages ought to be recovered. The

1823. warranty in a deed was introduced at a very early period of English tenures. Its object was, in case of eviction of the title warranted, to secure to the warrantee lands of equal value to the lands from which he was evicted; and the diversity of opinion has been, on the question whether of equal value at the time the warranty was entered into, or at the time of the eviction of the warranty. The pleadings are said to be the best evidence of the law, and I think will settle the point in controversy. If a party was sued in an action in which he might vouch the warrantor, the latter was at liberty to plead the actual value of the land warranted at the time the deed was executed, and the voucher recovered other lands of that value only. If he failed to plead, a jury was empannelled, to enquire into the value, at the time of the warranty, and the recovery over was of lands of that value, and no more. This seems to have been the settled law, from the time of Edward 3d down to James 1st. *Year Book*, 3 *Ed.* 3, 14 *B.* So also laid down in *Fitzherbert*; Brooks and Roll's Abridgement. Covenants of seisin against eviction, and for quiet enjoyment, were introduced into deeds long after warranties, not for the purpose of greater indemnification, but to supply some defects in the warranty of another description. The warranty gave no remedy against the personal estate of the warrantor. It lay only against himself, or his heirs. If there were no lands in the seisin of the warrantor, when the writ was issued in the suit in which he was vouched, there could be no recovery over against him. So, also, if none, when the writ of *warrantia chartæ* issued, the warranty was unavailing. *F. N. B.* 222. These were obvious objections to a sole reliance on a warranty, when personal property had become of more consideration than at the time warranties were alone resorted to for indemnification, in case of eviction by superior title. Upon a covenant of seisin, the party is to be indemnified for the money paid; perhaps with interest. It is so expounded by the English law. Upon covenants

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against eviction, the rule is the same; and, upon general principles, it ought to be so. Neither improvements or increased value of the land, is in the contemplation of the parties, nor is diminished value considered by them. The land, and the price given, are the subjects of the contract. Any thing more would be speculative matter; as to which, value could not be so fixed as to bear any reasonable proportion to the matters in the contemplation of the parties at the time. The rule of the civil law differs from the common law rule, (which delights in certainty,) and is said by some writers to be a very arbitrary rule. It is admitted, not to apply to extreme cases, and is, of course, very unsettled. By that rule, it is admitted, that damages are recovered for improvements, and other incidental changes in value. Speculative damages have been uniformly discountenanced by the decisions of this Court. In the few cases that have been before it, in which the doctrine of warranty has been glanced at, (without a thorough investigation of it,) it has been supposed by the Judges to be a hard doctrine; and the cases have been decided upon what, I am of opinion, is the correct standard of value, in exclusion of speculative damages. But, whatever may be the true standard of value, deducible from any analogy to the recovery over upon a warranty at the common law, it would not apply to this case. The appellee, Jackson, never was in possession of the land, under his title from the appellant. He came into possession under another title, as appears by the verdict, with full knowledge that it was a better title than the one under which he claimed. His action of covenant, upon the warranty, accrued before he entered upon the land in question; and, he cannot be entitled, by his own act, to larger damages than the then breach of covenant gave him. In effect, there being no good title in the appellant, when he conveyed, and no possession in the appellee, under the conveyance, the covenant was broken, *in limine*, and gave the appellee an action, substantially upon a covenant of seisin. The alledged breach of the covenant, in the declaration, gave it that cha-

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1823. racter also. It negatives the power and authority of the
December. appellant to convey the title, as a part of the breach of his
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 Stout covenant to warrant; and the finding of the jury supports
 v. that allegation. On this ground, therefore, whatever may
 Jackson. be my opinion, upon a more thorough investigation of the
 doctrine of warranty, I am of opinion, the judgment in
 this case must be for the lesser damages found by the jury.

COLE v. PENNELL, &c.

1823. Where an office judgment is obtained, in an action on a promissory note,
December. against two defendants, one of whom is an infant at the time of confirming
 the judgment; on a writ of error, *coram vobis*, being brought, the proceed-
 ings should be set aside, as far as the declaration, or other good pleading.
 So decided by two Judges, in a Court consisting of three.

The judgment in such case ought to be revoked as to *both* defendants, and not
 as to one only.

In such case, the proceedings ought not to be reversed, *in toto*, but remanded
 to the rules, to be proceeded in from the last good step.

This was an appeal from the Superior Court of Law of
 Harrison county.

Cole brought an action of debt against *Pennell* and
Wamsley, merchants, and joint dealers, trading under the
 firm of *F. A. Pennell & Co.* The declaration was filed
 at the November rules, 1817. The defendants being ar-
 rested, and not appearing, a conditional judgment was en-
 tered at the rules. In December following, the defendants
 still failing to appear, the conditional judgment was con-
 firmed against the defendants, and their appearance bail.
 On the 18th of April following, that being the last day of
 the term of the said Superior Court, the judgment afore-
 said became final, according to the act of Assembly.

On the 4th of June following, the defendants, *Pennell*,
Wamsley, and *Heiskill*, their appearance bail, having

sued out a writ of error, *coram vobis*, the Superior Court of the said county awarded a *supersedeas*, upon bond and security being given for the effectual prosecution of the said writ of error.

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An assignment of errors accompanied the application for a *supersedeas*, which stated, that the said *Pennell*, "at the time of the commencement of the said suit, and at the time of making and entering the common order, for want of an appearance therein, and at the time of the entry of the said judgment aforesaid, was under the age of twenty-one years, to wit: of the age of twenty years, and no more, to wit: at the county of Harrison, aforesaid, in which case, the said Fielding" (meaning *Fielding A. Pennell*), "ought to have been admitted to appear and defend the said suit by his guardian;" and this they are ready to verify. The assignment concludes with praying, that the judgment might be revoked, annulled, and altogether held for nothing.

With the assignment of errors, the affidavits of *Pennell*, the defendant, and his father, were filed, going to prove, that the said *Pennell* was born on the 9th of January, 1797.

The bond and security were given, according to the terms of the order awarding the *supersedeas*.

Cole appeared by his attorney, and craved *oyer* of the record mentioned in the writ of error, and pleaded, that the judgment in his favor ought not to be reversed or annulled, because, after taking the judgment aforesaid, at rules, in the Clerk's office, against the said *Pennell*, *Wamsley*, and *Heiskill*, their appearance bail, and before the next term of the Superior Court, held on the 18th of April, 1818, to wit: on the 9th of January, of the same year, the said *Pennell* became of full age.

To this plea the plaintiff in error demurred generally, and the defendants joined.

The Court sustained the demurrer, over-ruled the plea, and reversed and annulled the judgment in favor of *Cole*.

1823. obtained at the rules, and which afterwards became final by
December. the rising of the Court at the spring term, 1818.

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Cole appealed.

Nicholas, for the appellant, made four objections to the judgment of the Superior Court:

1. The writ of error *coram vobis* ought to have been applied for to the *Court* itself, and not awarded by the Clerk, and this fault being in the foundation of the proceedings, vitiates the whole.

2. The plaintiff in error in the Inferior Court, improperly alleges that he was an infant, at the time when the judgment was obtained against him. The judgment was never complete, until after the term. *Digges's exr. v. Dunn's exr.*, 1 Munf. 56; and then, it is admitted by the demurrer, the party had attained full age.

3. Writs of error *coram vobis*, on the ground of infancy, do not lie on behalf of an *adult*, as the party was, when he applied in this case. It is fatal for an infant to bring error to reverse a judgment, by *attorney* and not by *guardian*. 3 *Bac. Abr.* 616, *tit. Infancy*; *Co. Ent.* 289; *Cro. Ja.* 25. The party in this case had a day in Court, at which he might have pleaded infancy.

4. The judgment should not have been reversed in favor of *Pennell*, because it was a joint judgment against a mercantile firm, and would bind the social effects, though one of the partners might have been an infant during part of the partnership, but admitted to be of full age when the judgment was obtained.

Leigh, for the appellee.

It sufficiently appears from the record, that the writ of error was regularly awarded, or at least allowed. The bond recites, that the writ had been awarded by a Judge of the General Court; and should that point be deemed

material, there is little doubt that a *certiorari* would bring up a record, which would shew the award in form. Besides, it is stated, that the writ was produced in Court, by the plaintiffs in error, and that the Court thereupon superseded further proceedings on the judgment complained of; which, if not a formal award, is clearly an allowance of the writ; and the defendant in error having appeared and pleaded cannot avail himself of it.

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But, writs of error of this kind may be prosecuted without being awarded by the Court, or a Judge in vacation. At common law, all writs of error in civil cases, as well those from a Superior to an Inferior Court, to correct errors in law, as writs of error *coram vobis* to correct mistakes or errors in fact or in process, were suable of common right, *ex debito justitiæ*. *Queen v. Paty*, 2 Salk. 504; 2 *Wms. Saunders*, 101, *a*, note. The provisions in our statutes do not relate to writs of error *coram vobis*. 1 *Rev. Code*, chap. 69, § 55, 6, 7, 8, 9; chap. 64, § 11.

The writ of error *coram vobis* was clearly the proper remedy in this case. 2 *Wms. Saunders*, 101, *a*, note; *Gordon v. Frazer*, 2 Wash. 130. That a judgment against an infant is error, there can be no doubt. 3 *Bac. Abr. Infant*, K. 618.

But, it is said, that this is not a judgment against an infant; that there was no judgment, till the conditional judgment, entered at the rules, had been confirmed in term; and that then, the infant had attained to his full age. On this single point, the plea of the defendant in error rests the case.

But, the whole proceedings at rules were erroneous, and should have been set aside, instead of being confirmed at the ensuing term. If the office-judgment was irregular and nugatory, there was nothing to be confirmed.

Where an infant defendant makes default, the plaintiff ought to apply to the Court to assign him a guardian *ad litem*; and he cannot take any available step till that be

1823. done. 2 *Wms. Saunders*, 117, *f. n. 1*; 3 *Bac. Abr. December. Infant, K.* 617; 9 *Vin. Error I.* pl. 13, p. 488.

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The writ of error was rightly prosecuted by attorney, the infant having then attained to full age. 3 *Bac. Abr. Infant, K.* 616.

Judgment being reversed for error as to the infant, was properly reversed as to all the defendants. 2 *Wms. Saund.* 212, *a. n. 4*; *Ruffin v. Call*, 2 *Wash.* 181.

A writ of error is a *supersedeas* from the date when allowed, and bail put in, or (according to our practice,) bond given. 2 *Bac. Abr. Error H.* 477.

December 16. The Judges delivered their opinions.*

Judge GREEN.

It has frequently been determined here, that a judgment by default in the office, for want of an appearance, if founded upon erroneous proceedings at the rules, is erroneous; and that such error is not cured by the statute of *Jeofails*; but, in such cases, if the writ be good, the erroneous proceedings are only set aside, and the cause again sent to the rules, to be there proceeded in. An appearance will cure many errors; but, if the party, although he might have appeared, either at rules or in Court, to set aside the office-judgment, fail to do so, his default in not appearing does not cure any error in the proceedings.

In the case at bar, one of the appellees being an infant, undefended when the rules and judgment were taken against him in the office, although adult before the term of the Court at which that judgment might have been set aside, his failure to appear did not cure the error, if any, in the proceedings in the office. Those proceedings were erroneous. No rule could be taken against him, until a guardian was appointed to defend him, or he attained his

* Judge CABELL, absent.

age; and, if no one on his behalf applied to the Court to appoint one, the plaintiff was bound, at his peril, if he had continued an infant, to do so. 1823.
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Two inconveniences would arise out of this rule to the plaintiff; but, they are such as are unavoidable, without abandoning the rule of law, that an infant cannot be prejudiced by any judicial proceeding, unless he be defended by guardian; a rule, without which, infants, incapable of protecting themselves, might be utterly ruined, under colour of judicial proceedings. One of those inconveniences is, that the plaintiff could not proceed a step in the cause, beyond the filing of his declaration, until the infant attained his age, or the Court sat, so as to enable him or some other to move to appoint a guardian *ad litem*. The consequence of which is, that he must continue the cause at rules, without taking any rule in the mean time. The other is, that if the infant be held to bail, and will not or cannot give special bail, as he cannot appear without bail, unless with the plaintiff's consent, the latter must be content to continue the cause at rules, until the infant attains his age, or to consent to his appearing without bail, which would be left to the election of the plaintiff.

The failure of the infant to appear after he was adult, does not cure the errors at the rules; and, the judgment, being founded on those erroneous rules, is, therefore, erroneous. Moreover, the rules and judgment being joint, and erroneous as to one, they were erroneous *in toto*, and ought to have been revoked. But, these errors not extending to the writ or declaration, the Court went too far in depriving the party of the benefit of his writ and declaration, which were good. For, if the infant had pleaded infancy, and it had been found for him, judgment might still have been given against the adult defendant; *Hartrup v. Thompson*, 5 Johns. Rep. 160; or, the plaintiff might have replied necessities, though probably without effect; or, the infant may have confirmed the contract since he came of age. The plaintiff could not have had

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the benefit of such replications upon the writ of error, and should not be precluded from availing himself of them, if the facts exist. The judgment should have been revoked, and all the proceedings at rules, subsequent to the filing of the declaration, set aside; and the cause sent to the rules, to be further proceeded in. The infant now being adult, must give special bail, and plead, or judgment may properly be entered against him, by default for want of appearance, or by *nil dicit*, as the case may be.

Judge COALTER.

I have not been able to satisfy myself, whether the plea in this case was a bar to the writ of error, or not.

The other Judges, however, being of opinion that it is not, I will merely state my doubts, in order, that if a similar case should ever come before the Court again, an opportunity may be afforded for further enquiry.

The appellee, *Pennell*, who has brought this writ of error on the ground of his infancy, was the principal partner, it would seem, in a store, contracted this debt in Philadelphia for goods, and executed the note of the firm. Suit is brought on this note in the Superior Court of Harrison county, returnable to the November rules, 1817, and appearance bail given by the defendants. There being no appearance, an office-judgment was then taken, which at December rules was confirmed. It appears, that on the 9th of January following, the plaintiff in error arrived at full age. The cause stood as an office-judgment at the April term following, and not being set aside, is, by the law, to be considered as a judgment of the last day of that term, and would be so stated in any exemplification of the record, in the same manner as if actually entered in the order book of that day, and signed by the Judge. At this term, the party was of age. Generally, a plea to a writ of error of this kind, that the plaintiff in er-

ror was of age at the time of the judgment, is a good bar to the writ. 2 *Lill. Entr.* 491, 231, 270.

Suppose he had pleaded at the rules by attorney, and this plea had been tried at the April term. Had he been then an infant, this would have been error; but, I believe, it would not in this case, he being then of age; and that a plea to the writ, that he was then of age, would have been good.

In an action against a defendant who is an infant, the plaintiff may declare as against another person, and it is not necessary to declare against him as an infant, and charge that the goods were necessaries. 2 *Morg. Vade mecum*, 443; 5 *Comyn's Dig.* 173. The suit then was well brought without naming him as an infant, if that had been known. April term was the first time at which the plaintiff could have applied for a guardian to be named; but, then the defendant was of age. What was the plaintiff then to do? Was he to take an office-judgment at November and December against the other defendant, and suspend proceedings against the infant until January rules, (for they were on the 19th, and he was of age on the 9th,) and then take a judgment against him, and confirm it at February rules? Had he done this, I apprehend there would have been no foundation for the writ of error. He, however, takes an office-judgment against both, before the infant came of age.

Suppose he had been under age at April term, and the plaintiff had then moved to have a guardian named, but the infant failed to give appearance bail, without which, I apprehend, the guardian could not enter an appearance and defend, what could the Court do? All that could have been done in that case, it appears to me, would have been, to set aside the office-judgment against him, and send the cause to the rules, that he might give bail, and appear there. But, could even this be done, unless special bail was first given, so as to enable the guardian to appear and make the motion? I am not prepared to say,

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1823. that an infant is not to give bail. He may have contracted a debt for necessities. He may, on the eve of coming of age, have committed an outrageous assault, and may also be on the eve of flying the country, and bail may be necessary.

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But, at the office-judgment Court he was an adult, and at least stood in no better situation than if he had been an infant, and a guardian had then been assigned. Had he then appeared in Court, and moved to send the cause to the rules without bail, ought the Court to have done so? Had he given bail, and set aside the office-judgment, then the errors, if any, at the rules, would have been cured: 2 *Wils.* 50; and the most he could have complained of, would have been, that he ought to have an opportunity at rules, to plead in abatement. The Court might have sent it back for that purpose, or perhaps permitted such plea in Court, under the circumstances.

These are some of the grounds, on which I doubt whether the plea in this case was not a bar to the writ of error.

The other Judges, however, being of opinion that it was not, still I think that the judgment on the writ of error is erroneous. The writ and declaration were good, though the proceedings in the office against the infant were not. The course of the Court then, is, to reverse the first error. The judgment and proceedings, then, ought to have been reversed to the declaration, and the cause remanded to the rules, for further proceedings.

Judge BROOKE.

The objection, that the writ of error in this case was issued by the Clerk, and not upon motion in Court, is obviated by the facts in the record. The order of the Court, superseding the judgment sought to be reversed, is made on the day of the date of the writ; and the bond recites, that the writ issued by the order of a Judge of the General Court. In the absence of these facts, the objection

comes too late after *oyer* of the writ of error, and a plea to the assignment of errors, in pursuance of the writ. The judgment on these proceedings, I think, is also correct. The coming of age of the appellee, *Pennell*, since the common order, can give no new aspect to the case. No future pleadings can avail the appellant. The infancy of the appellee being admitted by his plea to the assignment of errors, and adjudged upon demurrer, cannot again be put in issue in any proceedings at rules, nor would it be regular to send the cause back to rules, for a plea that could not be negatived by the plaintiff. I am, therefore, of opinion, that the judgment ought to be affirmed.

Judgment and proceedings reversed to the declaration, and the cause remanded to the rules, for further proceedings.

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DELONEY v. HUTCHESON, &c.

1823.
December.

Where parties purchase an estate, jointly for the purposes of their trade, it is considered in *equity* as an estate in common, in England; and, in Virginia, where the *jus accrescendi* is abolished, it is so considered in *law* as well as *equity*. Therefore, a surviving partner can have no other claim against real estate, held in partnership, than any other creditor has. *Per GREEN, Judge.* An administrator who injoins a judgment against him, in his representative character, on the ground, that he is a creditor of the estate of the decedent, must be prepared, on the motion to dissolve, to shew, from his accounts, that he is a creditor. So decided by two Judges out of three.

This was an appeal from the Richmond Chancery Court.

Deloney and *Ferrell*, entered into a mercantile partnership; and purchased together a small tract of land in *Mecklenburg* county, on which their store was kept. Some years afterwards, *Ferrell* died; intestate, leaving a widow and four children; and *Deloney* became adminis-

1823. trator on his estate. The widow of *Ferrell*, the four chil-
December. dren, by their mother, as their guardian, and *Deloney*,
 united in petitioning *Mecklenburg* Court, to have one
Deloney moiety of the land aforesaid sold; as the land, when divi-
v. ded among the representatives and heirs of *Ferrell*, would
Hutcheson. not amount to one hundred dollars each, if sold in separate
 parcels.

The Court accordingly granted the petition, and ap-
 pointed commissioners to sell the land. *Deloney* became
 the purchaser, and executed his bond for the purchase
 money.

The bond not being paid when it became due, suit was
 brought on it by *Hutcheson*, surviving commissioner, and
 judgment obtained.

Deloney then filed a bill of injunction, stating the forego-
 ing facts, and that he had administered all the personal es-
 tate of the said *Ferrell*: that the estate is indebted to him, in
 his character of surviving partner, and administrator, in the
 sum of several thousand dollars: that, the debt aforesaid is
 the only estate, real or personal, which then remained;
 and that if it should be paid over to the widow and heirs
 of *Ferrell*, he would never receive any portion of the debts
 due to him; that, the debts due to him, as administrator,
 are of such dignity as to subject the real estate, and bind
 the heirs of his intestate; and the debt due to him as sur-
 viving partner, ought to charge this particular property,
 "which was bought for partnership purposes, and was held
 as joint stock." He therefore prayed, that the judgment
 might be enjoined, and made *Hutcheson*, *Mary Ferrell*,
 and the infants, defendants.

The injunction was awarded.

Hutcheson answered, that he was ignorant of the va-
 rious matters alledged in the bill: that he only acted as
 commissioner to sell the land, under the order of Court;
 and that he is entitled, at all events, to the amount of
 his account, for expenses in carrying the order of the
 Court into effect, for prosecuting the suit at law, and for
 his personal trouble in attending to, and defending this suit.

The answer of *Mary Ferrell* states, that her husband was possessed of a considerable estate in lands, slaves, and other personal property, at the time that he entered into the partnership mentioned in the bill, when he sold his land, as she believed, to set up the store, and commence business: that, she understood, that her husband advanced £ 500, and the complainant, £ 800; and their proportion of profit or loss was to be in the same proportion; and her husband was to receive wages for his personal services in conducting the business: that, some time afterwards, a dissolution of their partnership took place; upon which event, she understood, that the complainant kept them on his own account, and that the complainant was on that account indebted to him in £ 700, or upwards: that, upon her husband's death, (who died intestate, possessed of a tract of land, several slaves, and other personal estate,) the slaves and personal estate, as well as all the personal estate and all the remaining debts and subjects due the concern, came into the hands of the complainant: that all the estate of slaves and personal property was sold by him, and the proceeds thereof have come to his hands: that, whether the defendant has applied the whole proceeds of the estate to the payment of his intestate's debts, she cannot say; but, she thinks it strange, if it be true that he had expended more than the estate, in the payment of his intestate's debts, and the subjects of the partnership transactions, that he should omit to return an inventory, and account of sales to Court, and should so long have delayed a settlement of his accounts: that, it is highly improbable that the complainant is in advance to his intestate's estate, as he could have had no hope of reimbursement, after the assets were exhausted, and he was always embarrassed in his own affairs, and frequently compelled to sell his own property to meet his engagements. She, therefore, calls upon him for a close of his administration, and a settlement of his partnership transactions, &c.

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1823. On motion, the Court of Chancery dissolved the injunction, and ordered that the plaintiff render an account of his administration of the estate of *Ferrell*, deceased, before a commissioner of the Court, who was also to state and settle the accounts of the copartnership of *Ferrell*, *Deloney*, &c.

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Deloney obtained an appeal from a Judge of this Court.

Gilmer, for the appellant.

Leigh, for the appellee.

The case was submitted.

December 17. The Judges delivered their opinions.*

Judge GREEN.

In England, when partners purchase an estate jointly for the purposes of their trade, although at law, upon the death of one, the estate survives to the other; yet, in equity, it is considered as an estate in common. If the representatives of the deceased partner claim this equity, they must submit to the rule, that he who will have equity must do equity, and pay to the surviving partner whatever may be due to him on their partnership transactions. In Virginia, the *jus accrescendi* is abolished, and the representatives of a deceased partner, claiming the legal title, can be put under no conditions. The surviving partner, if he be a creditor, can have no other remedy against the real estate, than any other creditor can have. There is, possibly, another ground, on which one partner may have a lien for any balance due upon the partnership transactions, upon real property *purchased with the partnership funds*. If one purchases, and pays for land, and

* Judge CABELL, absent.

causes it to be conveyed to another, there is a resulting trust for the purchaser. If a purchase be made with the funds, and for the purposes of the partnership, there may be a trust, although the conveyance be to the partners in their individual characters, for them in their characters as partners, and for the purposes of the partnership; and the consequence may be, that each partner may have a lien upon it, for the balance due to him, from the concern; or, rather an interest in it, proportioned to his interest in the partnership funds. *Sugd. Law of Vend.* ch. 15. This resulting trust can only arise upon the original payment being made with the partnership funds; not from a subsequent agreement to hold the property as partnership stock; for, such an agreement would be void under the statute of frauds. But, however this may be, the plaintiff has not brought his case within this principle; for, he does not allege that the property in question was purchased with the partnership funds. I do not think, that the statement that he and *Ferrell* purchased the land on which their store was kept, and that it was bought for partnership purposes, and was held as joint stock, is equivalent to such an allegation; for, all this is consistent with the fact of each partner paying his proportion of the purchase out of his individual funds.

If the appellant was a creditor, and had, as administrator, paid debts which bound the heirs, he might, upon the principle of marshaling assets, reach the fund in question. But, he should have been prepared, at the time the motion was made to dissolve, to shew, at least, that he had paid such debts, and have exhibited the accounts of his administration, on oath; otherwise, the consequence would be, that a most expensive litigation might have continued in vain, for several years. The conduct of the appellant raises a strong presumption against him. He united with the widow and children of *Ferrell*, in the petition for the sale of the property in 1809, and never asserted the claim he now sets up, until 1818.

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1823. I think the order appealed from is right, and should be affirmed; especially, as he is not precluded from moving to reinstate the injunction, upon shewing, by the deed, or otherwise, that the land was purchased with the partnership funds, and making a proper case in other respects.

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Judge COALTER.

If it was not wrong to grant the injunction in this case, because the complainant did not file with his bill his administration and the partnership accounts, so as to shew precisely how, and to what extent, he claimed a credit under each, then it was wrong, in my opinion, to dissolve the injunction before taking those accounts, or at least apprising the party, that it was necessary to exhibit them, and his vouchers, in the cause. This could easily have been done, by dissolving the injunction, unless they were filed within a given day. The affidavit of the party to his bill, is always taken as a sufficient verification of it, to authorise an injunction; and, I believe, the usual practice is, especially in cases of executors or administrators, where accounts necessarily exist, to refer them to a commissioner, and not to burthen the record, in the first instance, with voluminous accounts and vouchers; and this reason would also apply to partnership accounts, which are, generally, not only intricate, but voluminous. It is not denied, that the appellant was administrator, and also surviving partner; and, if the appellees really believed they had claims against him, in either character, to the amount now to be recovered, it is strange that no attempts had been made to bring him to a settlement. Besides, it is stated, that these parties will be unable, if the money goes into their hands, to refund it. This makes the case, in this respect, stronger than that of *Miller's executors v. Rice; and others*, 1 Rand. 438.

If, however, the Chancellor thought, from the allegations in the answer, that there were reasons to suspect that no such accounts existed, he could have given the

party an opportunity to file them, by a *nisi* decree, as 1823.
 above stated, or, at farthest, by directing the money to be *December.*
 paid into Court, or to be placed there by the officer, after *Deloney*
 it should be made on the execution, so as finally to have it *v.*
 within his power. *Hutchinson.*

For these reasons, I am for reversing so much of the decree as dissolves the injunction, and for affirming the residue.

Judge BROOKE.

The appellant was in the County Court of Mecklenburg, upon a petition, with the widow and children of his intestate, to sell the land of his deceased partner, when he applied for the injunction. The equity which he alledges in his bill, was a proper subject for that Court in which he had taken administration of the estate of his partner. His equity is in hostility to the decree he asked for in that Court. If there is any foundation for it, upon a bill filed there, he would have been relieved, and the account of his administration would have been taken there, instead of the Chancery Court at Lynchburg; but, he has furnished no proof in that Court, in support of his bill, the allegations in which being denied by the answer, the injunction was properly dissolved. I am, therefore, of opinion, that the decree ought to be affirmed.

Decree affirmed.

1824.
January.

WILSON, Adm'r. &c. v. CALDWELL, &c.

In this case, the appellant having failed to bring up the record in time, *Johnson*, for the appellee, moved the Court to docket, and dismiss the appeal; but, he had only a copy of the *decree* in the Court below, and the appeal therefrom, and not a complete record. The Court granted the motion, (the appellant being called, and not appearing,) deeming the copy of the decree, and the appeal therefrom, sufficient under the act of Assembly.

1824.
January.

BAGWELL and others v. ELLIOTT and Wife.

It is not necessary that a will should be proved in a Court of probate, in order to give it validity as a will of land.

The time of publication is not necessarily fixed by the date of the will; and it may be proved to have been published on a subsequent day, by two subscribing witnesses; although it has previously been admitted to probate, without any particular notice that it was published on a different day from its date.

This was an appeal from the Superior Court of Law for Accomack county.

Bagwell and others brought ejectment against *Elliott* and wife, for a certain tract of land, containing sixty acres, lying in the county of Accomack. At the trial, the jury found a special verdict, to the following effect: that, *Thomas Bagwell*, late of the county of Accomack, being upwards of twenty-one years of age, on the 5th day of November, 1810, duly made and published his last will and testament for passing real estate.

The devise under which the defendants claimed, is in the following words: "*Item*, I give the whole of the

residue of my estate, of what kind or description soever, to my beloved wife *Peggy Bagwell* and her heirs and assigns, except the sum of one hundred dollars, which I give to the bishops of the Methodist Church, &c." This will was signed, sealed, and published in the presence of six witnesses, who subscribed their names.

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The verdict further finds, that the said *Thomas Bagwell* departed this life on the 16th day of May, 1816, leaving his said will in full force; which will, on the 27th day of May, 1816, was duly proved before the Court of the county of Accomack, and admitted to record: that, *subsequent to the date of the said will, and before the death of the said Thomas Bagwell, viz: on the 8th day of July, in the year 1815*, the said *Thomas Bagwell* purchased the lands in the declaration mentioned, of a certain *John Ironmonger*, who, on the same day, conveyed the same to the said *Thomas Bagwell*, in fee simple: that, at the death of the said *Thomas Bagwell*, he left no children, nor father, nor mother living, but left two brothers of the whole blood, viz: *Isaiah Bagwell*, and *George P. Bagwell*, lessors of the plaintiff, and two sisters, viz: *Elizabeth J. Wise*, and *Sarah Ashby*, (both of the half blood,) and also lessors of the plaintiff, and no other brothers or sisters, nor their descendants: that, about four or five weeks before the death of the testator, *Asa Shield*, *James Shield*, and *Abel Garrison*, being at the house of the testator, his wife, who is the female defendant, whispered to the testator, and then went into another room; and while she was out of the room, the testator said that all the witnesses to his will were dead, and his wife had been teasing him to have it witnessed again; and also said, that he had purchased two other pieces of land, and had had a thought of making a new will, or altering that: that, Mrs. *Bagwell* then brought the will into the room, and laid it on the table; and the testator then said to the said *Abel Garrison*, *Asa Shield*, and *James Shield*, "this is my will;" and requested them to witness the same; which they did

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in his presence, and in the presence of each other: that, Mrs. *Bagwell* then took up the will, and carried it out of the room: that, immediately after the death of the testator, the defendant *Margaret* entered upon the lands in the declaration mentioned, and that she and her husband, the other defendant, continue in possession thereof; and if, upon the foregoing facts, the law be for the plaintiff, they find for the plaintiff his term yet to come in the lands in the declaration mentioned, and one *cent* damages; and, if the law be for the defendants, they find for the defendants.

The parties, by agreement, added the following fact to the special verdict, viz: that the said *Thomas Bagwell*, at the time of his death, left no descendant of a child living.

The Court gave judgment on the special verdict for the defendants.

The plaintiffs appealed to this Court.

Leigh, for the appellants.

Wickham, for the appellees.

January 30. The Judges delivered their opinions.

Judge GREEN. The special verdict in this case expressly finds the due execution and attestation of the will originally, and the re-publication of it by the testator, after his acquisition of the lands in question. That re-publication was in such a form, as that, if the original execution of the will had not been duly proved, that which was in fact a re-publication would have been received as sufficient to establish the will as then, for the first time, executed. It was, in effect, a *re-execution* of the will. The declaration of the testator to the witnesses, before he acknowledged the will for his, and requested them to attest, cannot, consistently with the principles of law, be received to impair the legal effect of his acknowledgment of the will.

That effect was to make the will speak as at that time. The words of the will are appropriate to pass the lands in question to the female defendant, unless, in point of law, it be necessary that a will of lands should be proved and recorded, before it can have the effect of passing a legal title. The special verdict finds, that the will was duly proved and recorded, but does not disclose whether the original or subsequent execution of the will was proved in Court, although both were proved before the jury. If it be necessary to the validity of a will of lands, that it should be proved and recorded, then it is necessary, when a republication is relied upon as having the effect of passing after-purchased lands, that such re-publication should also have been proved in the proper Court, and that proof also recorded; and nothing in the record under consideration, ascertains that the re-publication of the will was proved in the Court of Probate.

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Before the statute of wills in England authorised devises of land, and ever since, the Ecclesiastical Courts had jurisdiction to receive and compel the proof of wills, or more properly, of testaments of personal chattels. Originally, a will of lands might be proved by the same evidence, as a testament of personals. This proof, as to a will of personals, was left to the discretion of the Ecclesiastical Court, and was very loose. The statute of 29 Car. 2, required, that wills of land should be attested by three witnesses, subscribing their names in the presence of the testator, and signed by the testator, or by some other in his presence and at his request. The statute of wills did not give to the Ecclesiastical Courts any jurisdiction of wills of land. Accordingly, although a will of land and personal property was proved in the Ecclesiastical Court, that probate was no evidence of the will, so far as the lands were concerned; but the original will must be produced, and the execution thereof proved in a Court of Law, even before the statute of Charles 2nd; much less could it be received as evidence of a devise of lands after that statute, as the proof admitted

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in the Court of Probate might have been inferior to that required by the statute. 12 *Vin. Abr. tit. Evidence*, 126, *pl. 2*; *Ibid. pl. 4*. But, in case of the loss of the will and a long possession under it, the registry book was secondary and inferior evidence of the will, admissible, as in all other cases, as the best evidence which the nature of the case admitted of. *Ibid. pl. 8, 10*. The probate in the Ecclesiastical Court, whilst no evidence of a will of lands, was conclusive evidence of a will of personal estate. *Ibid. pl. 2, note*. As the probate of a will of lands and personals, in the Ecclesiastical Court, had no effect in establishing the will as to the lands, so it was not necessary, in order to its full effect, that a will of lands should be proved or recorded any where, but was, in all cases, to be produced and proved in the cause in which it came in question. In latter times, beginning in the time of Queen *Anne*, several acts of Parliament have passed, authorising memorials of wills to be registered, at the election of any party concerned. But, these acts are not general laws. The registry was not made upon proof of the will in any Court by witnesses, but was only a *memorandum* of the contents of the will, furnished to the register, under the hand of some one of the devisees, and by him registered of course, and was in no case evidence of the authenticity of the will. It was only intended to serve as a notice to the world of the claims made under the will, and the only effect of a failure to register such a memorial, was, that the will was declared to be fraudulent and void as to a purchaser for valuable consideration, without notice. Although a probate of a will of lands was wholly futile, a probate of a will of personals was indispensably necessary to enable the executor to prosecute any suit in that character. Yet, without probate, even a will of personals was effectual to all other purposes; so that an executor might do all other acts in relation to his testator's estate, such as selling, releasing, &c., and they would be valid. The Court of Probate had, however, a jurisdiction to compel the production and proof of the will.

Upon the settlement of Virginia, the only judicial tribunal in this country was the General Court, composed of the Governor and Council. This Court, of necessity, exercised jurisdiction in all matters necessary for the welfare of the Colony; and amongst other jurisdictions, that of the Ecclesiastical Courts in England, in relation to probates of wills and granting letters testamentary and certificates of administration. In process of time, the County Courts were established under the appellation of County Commissioners, with a very limited jurisdiction in small matters, for the relief of the General Court and the people. That jurisdiction was gradually enlarged by various statutes; and the first statute which we find, in relation to the probate of wills, passed in 1645, ch. 7. That act recited, that "whereas the estates of deceased persons in this Colony have been much wronged by the great charge and expense which have been brought in by the administrators thereof, by pretense of their attendance at *James City*, and the great distance of their habitations from thence;" and enacted, "that all administrations shall be taken, and the probate of wills made and the wills recorded at the County Courts, where the deceased persons did inhabit." Neither the preamble nor body of this act applied in any degree, to any question in relation to the proof or the recording of wills of lands; for, the recording of the will was necessary to the probate of wills of personal estate.

The next act upon this subject, was that of 1711, ch. 2. The statute of 29 Charles 2nd, had in the mean time been passed in England, in 1676. This statute did not, in terms, apply to the Colonies, and no statute of Virginia adopted it. Whether it was adopted by usage in Virginia, we have not now the means of knowing, though it probably was not, since in 1748 an act passed prescribing the mode of making and attesting a will of lands, differing materially from the English statute, especially in making a will valid without witnesses, if wholly written by the testator. Since then, the same evidence which was sufficient to au-

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thenticate a will of personals, was also sufficient to authenticate a will of lands from the first settlement of the country until 1748, and the jurisdictions of the Ecclesiastical and Common Law Courts were confounded in that of the General Court; and as the probate of a will of personals was, at common law, conclusive evidence of the authenticity of the will; the practice would naturally have arisen, of giving in evidence the probate of the will, as well for the purpose of establishing it as a will of lands, as of personalty. But, even if such probate was considered as sufficient proof of a will of lands, and binding on the heir, it did not follow that it was necessary to prove it, in order to give it effect as a will of lands, no more than it was necessary to make a probate of a will of personalty, to give it effect as a will at common law, although the probate, when made, was conclusive proof of the will.

The existence of such a practice was recognized and sanctioned by the act of 1711, which provided, that the County Courts should have jurisdiction to hear and determine all matters testamentary; to examine and take the proof of wills, and grant certificates of such proof to the Governor, in order to obtain probates, and to hear and determine the right of administration, according to the following rules: that the will should be proved in the county where the testator resided, without regard to the fact, whether he had any lands in the county in which he resided, or not; and, if he had no such residence, then in the county wherein any devised land lay; or, if lands in several counties were devised, and he died in any such county, it was to be proved in the county where he died; or, if he should die in any other county than where any of his lands lie, the will should be proved in one of the counties in which such land lay. "And, the proof of any will, once well and sufficiently made, in any county, as is above directed, shall and is hereby declared to be, of the same force, effect, and validity, for the disposing of lands or any other estate, as if the same had been proved in every

particular county, where any land or other estate shall be." It further provided, that, before any will wherein lands were devised, should be proved, the heir should be summoned to contest it; and, if there were no heir known, that proclamation should be made; and that persons laboring under the disabilities of infancy, &c. should be at liberty to contest the proof within ten years after the disability removed, "*and not after.*" It also provided, that the probate of a will, granted on the certificate of a County Court, as aforesaid, should enable the executor to recover the estate, real (I presume, when devised to him,) and personal, every where, "in like manner as they might or could do, within the several counties, where such certificate for obtaining probates shall be granted respectively." It was further provided, that nothing in that act contained, should disable any Court from compelling any person, having possession of the will, to produce it, "for the just and legal proceedings to be had thereon;" and directed that all original wills (for the better preservation thereof,) should remain in the Clerk's office, among the records, whereto, any person, whose occasions shall so require, shall have recourse.

Upon this act, I observe that, under the act of 1645, questions had arisen, whether a County Court had jurisdiction in any case where the testator did not reside in any county, and the act was made for the purpose of extending the jurisdiction of the County Courts, to such cases; but, as difficulties would have arisen, in determining to what county, in such case, the jurisdiction should belong, the act prescribed the criterion, upon which that jurisdiction should depend, by referring to the location of the testator's lands, as the only certain criterion, and not because of the effect of the probate on the will, as a will of lands; or, rather, not because a probate was necessary to a will of lands; for, if the testator had a residence in a county where he had no land, the will was to be there proved, although he might have lands in other counties.

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Secondly. Under the act of 1645, it had at least been doubted, whether the probate in a County Court had, on account of the limited jurisdiction of the Court, any effect out of the county, as to lands or goods; for, the act provides, that it shall have the same effect as to both every where, that it would have in the county where the proof was made. But, what effect that should be, in relation to lands, is not stated in the act. That effect appears, from other clauses of the statute, to have been, that the probate of a will was, in relation to land, as well as personals, conclusive proof of its authenticity; and this rule could only have arisen out of the long practice of the country to that effect. For, the statute provides, that the heir shall be summoned, &c., and that those laboring under disabilities, may contest the proof within ten years after the disability removed, "and not after;" provisions, which would have been superfluous, if the proof of the will had not been conclusive, but for those provisions. But, it does not follow, from the fact that such proof would have been conclusive, that it was necessary, either to the validity of a will of personal or real estate, or that no other proof was admissible as to a will of lands. Nor does the recognition of an authority to compel the production of the will, or the direction that the original will shall remain amongst the records, lead to the inference that a probate was necessary to the validity of a will of lands.

An act passed in 1744, authorising a will to be proved as soon as exhibited, and providing that it should not affect the heir at law, but, he was to be summoned as before, after the probate of the will, and might contest the validity of the will, as if that act had not been made. In 1748, an act passed, repeating the provisions of the act of 1711, with this difference, that the will might be immediately proved, when exhibited, but such proof shall not be binding on the heir; but, that he should be summoned to contest the validity of the will, at the next Court, and if there were no known heir, then that proclamation should be

made. The act neither prescribes what shall be the effect of such proclamation, nor of the probate, when there was a known heir; but, he cannot be actually summoned to contest the will. It has the same provision in relation to persons laboring under disabilities, as the act of 1711 has. This act was in effect the same, as the act of 1711, and is liable to the same remarks.

The act of 1785, ch. 61, substantially re-enacts the provisions of the acts of 1711 and 1748, with this difference, that, if a will be proved upon its presentation for proof, any persons interested might, within seven years thereafter, contest the validity thereof, by bill in Chancery; upon which, an issue shall be made up, and tried by a jury, "*whether the writing produced be the will of the testator, or not.*" But, no such party appearing within that time, the probate shall be forever binding. Both the act of 1748, and that of 1785, had a provision that nothing in them contained should impair the right of the executor to possess his testator's estate, and execute his trust before probate, in the same manner as if the acts had never been made. I should have thought, that without such a provision, that right would not have been affected. The various acts on this subject being made only to provide a tribunal for granting probates in this country, as a substitute for the Ecclesiastical Courts in England, a probate was not necessary here, but for the purposes for which it was necessary there, to wit: to enable the executor to sue; and that, to all other purposes, the will was valid without probate, as in England; and so the acts making the probate of the will conclusive as to lands also, but without requiring such probate as a pre-requisite to the validity of the will, as to lands, left the will, if not proved in the Court of Probate, to have the same effect as if the acts had not been made; that is, that the effect given to the probate of the will was for the benefit of those claiming under the will only. If the effect of the acts was, to declare the will invalid, if not proved in a Court of Probate, then those acts,

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1824. in many cases, would have been prejudicial to those claim-
January. ing under the will. For, until 1787, no provision was
Bagwell made for the means of authenticating copies of wills made
v. in a foreign country, for probate here, nor for procuring
Elliott. the evidence of witnesses residing abroad; and, until that
time, such will could not have been admitted to probate,
without the production of the original will and the wit-
nesses; for, no commission could issue for examining the
witnesses for proving the will in the Court of Probate.
From our connexion with England, the title to lands in
Virginia must, in innumerable instances, have depended
upon wills of persons residing in England, and made there,
the originals of which could not be produced here for pro-
bate, or upon the trial of a cause. Such wills, therefore,
must have been admitted in evidence, upon the trial of is-
sues, upon general principles of evidence at the common
law, or such inferior evidence as to their authenticity, as
was the best which the nature of the case admitted.

The provisions of these acts have, in substance, been
continued in our code to the present day, with some addi-
tional provisions which have no influence on the question
under consideration. It is not, therefore, necessary that a
will should be proved in a Court of Probate, in order to
give it validity as a will of lands. The only effect of such
probate is, to afford one mode of proof that the will is genu-
ine and authentic; but the mode of proof allowable before
the passing of those statutes, is not abolished or prohibited
by them; that is, by evidence upon the trial. If a will
offered for probate was contested and rejected, this might
be used thereafter, as the decision of a competent judicial
tribunal, and would condemn it forever. In the case at
bar, it was superfluous for the jury to find the probate.
That might be used as an evidence to them, that the will
was duly made and executed, and they might have found
that fact, without stating upon what evidence it was found,
as they might have found the fact upon the evidence of
the witnesses without setting forth that evidence. Sup-

posing the probate not to state any thing as to the re-publication of the will, as it most probably does not, then it may be said that it is proof of a will made at its date in 1810, and to speak, as to land, as of that date; and that the probate is, until set aside in the manner prescribed by the statute, binding on all the world, and cannot be contradicted by any evidence in any other proceeding. I answer, that if the party interested cannot, in another proceeding, prove the re-publication, her right is lost forever, although she were no party to the probate. For, she affirms, and does not contest the validity of the will; and, therefore, she is not a party who could exhibit a bill under the statute. If she could, the only question which could be submitted to a jury, according to the act, would be, whether the writing be the will of the testator or not; as to which, both parties affirm that it is, and the verdict must be in the affirmative. The only contest is as to the effect of the will, admitting its validity; that is, what property it passes. That depends upon the time of its publication, and not on its date; and that may be proved, as any other extraneous circumstance, which affects the operation of the will, may be proved. As, if the testator has two nephews of the same name, parol evidence may be admitted to shew which he meant. The only difference is, that a will of land can only be re-published in the presence of two witnesses, subscribing their names in the testator's presence. To give it the effect of a re-publication, it must be proved as an effectual re-publication. This proof does not impair or contradict the probate. That only affirms that the will is proved to have been duly executed, without an enquiry as to the time of publishing it. If, indeed, the question as to the time of publishing had been contested before the Court of Probate, and then decided, as it might have been, such a decision might have been relied on as *res judicata*; but, if this be not shewn, it cannot be presumed.

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Upon the whole, I think the judgment should be affirmed.

Judge COALTER.

The first question in this case is, whether the probate of the will ought to have been found by the jury and spread on the record.

The foundation of this objection to the verdict is, that no title can be asserted, as it is contended, by a devisee of lands, unless the will is first duly proved in the Court of Probate to have been made and published according to the statute, and that consequently the probate must be exhibited, that the Court may judge of its legality.

Admitting for a moment, that probate is necessary to entitle the devisee to the lands, and that he cannot produce proof of the execution of the will, on the trial, I think it is not, under every circumstance, necessary to set out the probate at large in the verdict, any more than to set out the record of the probate of a deed admitted to record. It is the usual practice, I believe, where no dispute arises on such point, for a jury to find, that A., being entitled to lands in fee, and lawfully seised thereof, made his will in due form of law, and which was duly admitted to record, &c., whereby he devised the same to B., who entered thereon, and being lawfully seised, by deed duly proved and recorded, &c., conveyed the same to C.

But, when seisin was necessary to enable a party to devise land, and the case turned upon that point, or the question was, whether the grantor had such possession as was necessary to authorise a conveyance, or whether the deed was duly proved and recorded, so as to bind a subsequent purchaser, then every thing is found so as to enable the Court to pronounce the law upon such point. The questions of seisin, possession, &c., are compounded of fact and law; yet, when no dispute arises concerning them, the jury find them, and I have never heard of an objec-

tion to a special verdict on that score. This appears to me to be a case much like that. The appellants are all devisees of the realty under this will, and two of them the executors. The verdict finds, that it was duly made and published as a will of lands in 1810; that the testator died in 1816, leaving the said will in full force, which, on the 27th of May, 1816, was duly proved and admitted to record before the Court of Accomack county, in the Superior Court of which county this ejectment was tried.

There seems to have been no dispute then, as to the validity of this will as a will of lands, or as to the probate thereof.

But, the lands in dispute were purchased by the testator in 1815, and the point in dispute was, whether there was a re-publication of this will after this purchase, which passed these lands to the female appellee, to whom the testator devised "all the residue of his estate of what kind or description soever;" that is to say, whether, what the witnesses proved in relation to that matter, amounted to a re-publication of the will or not? Another question was also made; whether, if the declarations made by the testator at that time could be considered a re-publication, it was not necessary that such re-publication should have been proved before the Court of Probate and spread on the record, so as to entitle the devisee to the land? And that, consequently, the will, as to this after-acquired land, is to be considered as never having been proved, and, therefore, giving no title to the devisee.

Admitting, however, for the present, that this will has been duly proved as a will of lands, as of 1810, and that the re-publication in 1816 is not spread on the record of the probate, I incline to think that the question is not precisely the same as it would have been, had it never been so proved and put on the record.

It is the duty of the executor or administrator with the will annexed, to produce the will and make oath that it is the true last will and testament, as far as he knows or be-

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lieves, and have it proved at least by one witness, so as to obtain letters testamentary. Suppose the executor is heir at law, and intends to contest the will, as one of lands, because the second witness did not subscribe in presence of the testator, or for other causes, and only proves it by one witness. Let us even suppose, that this will has only been so proved in this case, admitted to record merely as a will of personals, and the Court adjourned; by what process, or in what manner is the will again to be brought before the Court of Probate? The devisee cannot bring his bill in equity, under the statute, for he does not contest the *validity* of the will. Even the heir at law cannot sue under that statute, for the will has never been proved as a will of lands. But, if this is a will of lands, as found by the jury, and has been proved as such, as I think is the fair interpretation of the verdict, then all these parties are devisees under it, none contest its *validity*, and there is no remedy under the statute. Whether the will passes the lands in dispute or not, is then the only question. The devisee takes possession; the heirs at law sue, and prove that the lands were purchased after the date of the will. Suppose a testator has his will drawn on a given day, but it is not then executed; and afterwards purchases lands, and then executes his will devising the residue, as in this case; would it not be competent for the devisee to prove, that at the time of this purchase, the will was a blank paper, and never executed until after the purchase? I believe no probate of a will can be produced, which specifies the date of the attestation. The devisee has no day in the Court of Probate as to this point. He may reside out of the State. The heir formerly was summoned, but not the devisee. That was found inconvenient, and he had seven years, under subsequent laws, to contest the will.

A re-publication makes the will speak as at another time from its original execution, and as if it was made at this latter time; and I can see no difference between that and the case above supposed. Why cannot the devisee in

that case also, rebut the proof of the heir, by proving that the will was re-published, and, therefore, speaks at that date? I believe no record of a probate can be produced, in which the re-publication is stated. If such a case does exist, it must be because the devisee, by some accident, knew of the circumstance, was in Court, and had his witnesses ready to prove it. If he was not, I think he ought not to be precluded from such proof on the trial. At last it comes to a trial by jury, and that is the trial prescribed by the act of Assembly in case the will is contested.

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But, suppose the re-publication is a conclusion from facts, and does not depend on the parol declarations of the testator. *Powell on Devises*, p. 667, states such a case, which, though no authority is cited, may nevertheless be law. As where a testator makes two wills, the latter of which is repugnant to the former, and, of course, a revocation of it; yet, in that case, he says, if the testator destroy the last, and leave the first perfect and unobliterated, those acts, taken together, amount to a re-publication. Or, suppose a testator, by a declaration in writing, according to our statute, revokes his will, and afterwards calls the same witnesses, and destroys that paper in their presence; would not this also amount to a re-publication, without again expressly re-publishing his will, left entire, as aforesaid, before them, or any other set of witnesses?

If these acts would be a re-publication, of which no witness to the will is cognizant, ought they, or could it be expected that they should appear in the record of the probate?

As to the general question, whether a will of lands is so far void that a devisee cannot make title under it, unless it is first proved in a Court of Probate, if that question is involved in this case, it appears to me at present, as well for the reasons above stated, as to proof of the re-publication of such will, as from a view of the various acts of Assembly, that the proposition contended for cannot be sustained.

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Until the act of 1787, there was no provision for the probate of a foreign will of this description; and it cannot be contended, I presume, that, previous to that time, nothing passed by such will, and that the devisee could not recover under it.

The real question intended to be submitted by this special verdict is, whether the facts, found in this case, amount to a re-publication of this will, or not? If they do, then the after-acquired lands passed to the devisee, and the judgment must be affirmed. I think, the declaration of the testator, that "this is my will;" his request, that the witnesses should attest it; and their doing so, in his presence, was a re-publication of that paper, as his will; and that solemn act cannot be affected by the loose previous declarations made by him to the witnesses.

The judgment must, therefore, be affirmed.

Judges CABELL, and BROOKE, concurred; and the judgment was accordingly affirmed.

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MORRISON v. CAMPBELL and others.

Strict legal proof is not required against absent defendants, in Chancery; and, therefore, a will may be proved, in such case, by evidence inferior to that which would be required, where a defendant appears, and defends the suit. An inchoate right to land, held by entry and survey only, is *real* estate, and will descend to the heirs, and not the executors.

Warrants and surveys of land may be assigned, but not *entries*.

A man deriving title under a *forged* assignment of an entry, and who afterwards obtains a legal title from the Commonwealth, ought not to be preferred to one who holds a regular assignment of a survey of the same land.

The doctrine of *prelensed titles* examined.

David Duncan, in his life-time, was entitled to 21,000 acres of land, in Greenbrier county, by entries and sur-

veys, made for him by the surveyor of the said county, in the year 1787. *Duncan* died in 1791, leaving *Wallace* and *Kirkpatrick*, his executors, and authorising them, by his will, to sell and dispose of all his estate, real and personal. *James Morrison*, the appellant, in the year 1806, purchased the said surveys of the said *Wallace* and *Kirkpatrick*, executors as aforesaid. In the year 1796, the entries of the said land were assigned to a certain *James Welch*, by a paper purporting to be executed by *David Duncan*, and expressing a consideration of \$ 5,000 for the said assignment. *Welch* conveyed the said lands, by deed of trust, in 1797, to *Hicks* and *Campbell*, to secure a debt of \$ 3,933½. The deed recites, "that the said surveys were assigned to the said *James Welch* by the said *David Duncan*, and are returned into the office of the Register; copies whereof are delivered to the said *Hicks* and *Campbell*." The money not being paid when it became due, the lands were sold, and *Hicks* and *Campbell*, and *James Currie* became the purchasers. *William Currie* was afterwards admitted by *Hicks* and *Campbell* to a share in the said lands; and a patent was then issued to *Hicks* and *Campbell*, *James Currie*, and *William Currie*.

James Morrison then filed his bill in the Richmond Chancery Court, alledging, that he had become the lawful proprietor of the said surveys, by purchase from *Wallace* and *Kirkpatrick*, executors of *Duncan*, as aforesaid: that, the assignment of the entries to *James Welch* was forged, and not the assignment of *David Duncan*, the proprietor of the said surveys: that, the consideration of \$ 5,000 was merely nominal: that, he has done nothing to impair his rights, which are superior, in law and equity, to rights derived from the fraudulent assignment aforesaid; he, therefore, prays, that *Robert Campbell*, *Robert Gordon*, and *Janetta*, his wife, and *James Currie*; which said *James* and *Janetta* are the heirs at law of *James Currie*, deceased; *Robert Hicks*, *Nathan S. Dalland*, and *Sally*, his wife, and *John Hicks*; which said *Robert*,

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Sally, and *John*, are the heirs of *John Hicks*, deceased; *George Wallace* and *A. Kirkpatrick*, citizens and inhabitants of the State of Pennsylvania, and executors of *David Duncan*, deceased, *Charles Blagrove*, Register of the Land Office, and *James Welch*, may be made defendants; that *Robert Campbell* and the representatives of *James Currie* and *John Hicks* may declare whether they claim the land in question under an assignment of the surveys made by *James Welch*; that they may set forth what were the terms of the assignment from *Welch* to *Hicks*, *Campbell* and *Currie*, and what consideration passed for said assignment; that *Wallace* and *Kirkpatrick* may say whether they have not, under the authority conferred on them by the will of *David Duncan*, deceased, sold and assigned over to the complainant, all the right and title of the said *Duncan*, in and to the said surveys of the afore-said 21,000 acres of land; that the said *James Welch* may set forth, particularly, of whom he obtained an assignment of the said surveys, the consideration for which they were assigned, who were present, &c.; that the said *Welch* disclose all the circumstances of the said assignments; that the said *Blagrove*, Register of the Land Office, do exhibit copies of the surveys and grants, and the assignments on the former; that the said patents be vacated by a decree of the Court; that new grants be directed to be issued to the complainant, or if that should not be regular, that *Campbell*, the representatives of *James Currie* and *John Hicks*, be decreed to release and assign over all right and title they may claim in said lands, to the complainant.

The answer of *Robert Campbell* alledges the deed of trust executed by *Welch*, to secure a debt due to *Hicks* and *Campbell*, and conveying the land in question; that the original surveys and assignments were regularly made, as far as the defendant knows or believes, and are now in the Register's office; that the debt of the said *Welch* not being paid, the land was sold from time to time, when the defendant, *John Hicks* and *James Currie* became the pur-

chasers; that the defendant and his late partner, *John Hicks*, permitted *William Currie* to be interested with them to the amount of one-third of their two-third parts of the said land; that no patents having issued, at the time of the said deed of trust, the said *Welch* assigned the said surveys to the said *Hicks* and the defendant, and they directed patents to issue to *Hicks, Campbell, William Currie* and *James Currie*, in their proper proportions; and the patents were issued accordingly, on the 20th day of *November*, 1797; that the said patentees and their heirs are innocent purchasers for a valuable consideration actually paid, without notice of any adverse claim, until after they had obtained the legal title; that he does not admit that the assignment to *Welch* was fraudulent, but he insists that it was the genuine assignment of *David Duncan*; that the complainant, having purchased when the patentees were in possession of the land, and had obtained the legal title as fair purchasers, he was a purchaser of a pretended title, which is prohibited by law, &c.

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Robert Gordon and *Janetta*, his wife, and *James Currie*, answered, that it is true that the said *Janetta* and *James* are the heirs of *James Currie*, deceased, and children and legal representatives of *William Currie*, deceased; that as to the other allegations of the bill, they know nothing, of their own knowledge, and call for proof thereof; and that they are satisfied that both *James* and *William Currie*, deceased, were innocent purchasers for valuable consideration actually paid, &c.

The suit abated as to *Wallace*, by his death; and publication was made against the children* and heirs of *David Duncan*, deceased, *Kirkpatrick*, *Welch*, *Dalland* and wife, as absent defendants.

A. Kirkpatrick, surviving executor of *Duncan*, filed his answer, stating, that he admits that he and *G. Wallace*, since deceased, in pursuance of the will of *D. Dun-*

* These persons were made parties by an amended bill.

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*January.*veys of land in the bill mentioned, and all the said *Dun-*
*Morrison**can's* rights therein, for a valuable consideration, and de-
*v.*livered to the said *Morrison* certain original papers, con-
*Campbell,**connected* with the title of the said *Duncan*; that neither *Da-*
*&c.**vid Duncan*, in his life-time, nor his executors, since his
 death, have ever transferred the said *Duncan's* right in
 said lands, to any other person than the complainant,
James Morrison; that the defendant and his co-executor,
Wallace, were both ignorant of the steps taken by *Hicks*
 and *Campbell*, or any other of the defendants, in obtaining
 patents in these cases, their residence being in *Pittsburg*,
 in Pennsylvania; and he hopes that neither the represen-
 tatives of *D. Duncan*, nor the complainant, may be in-
 jured by the measures resorted to by *Campbell* and others;
 that he believes the assignment to *Welch* was fraudulent;
 and he is willing that the land in question should be de-
 creed to the complainant.

Dalland and wife filed their answer, disclaiming any
 knowledge of the transaction. *John Hicks*, by his guar-
 dian, did the same.

Among the exhibits is a paper purporting to be the will
 of *David Duncan*, which empowers his executors to sell
 and dispose of all his real and personal estate. He ap-
 pointed four executors, two of whom were *Wallace* and
Kirkpatrick above-mentioned. This will was never re-
 corded in Virginia; but, there is a certificate of *Samuel*
Jones, who styles himself *Register*, that the instrument
 exhibited is a true copy of the original, recorded in the of-
 fice for recording of wills in Alleghany county, Pennsylv-
 ania.

David Steel deposed, that *David Duncan* was a tavern-
 keeper in *Pittsburg*, at the time of his death, and for a
 number of years before; and that some time after his death,
 the deponent was informed that a certain *James Welch*
 had fraudulently obtained a conveyance for the lands in
 question, from a certain *David Duncan*, who sometimes

traded up and down the Ohio; and this *David Duncan* was a different man from the *David Duncan* of Pittsburg aforesaid; that this person told the deponent that he had no entries or surveys in Greenbrier county; that *Welch* was a trading and speculating man, of bad reputation, &c.

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Another witness proved, that there was a man named *David Duncan*, who was a different person from the one who lived in Pittsburg.

There was other evidence, which is fully stated in Judge GREEN's opinion.

The Chancellor dismissed the bill, and an appeal was allowed by the Court of Appeals.

Call, Nicholas and *Stanard*, for the appellant.

Hay and *Wickham*, for the appellee.

It was contended for the appellant, that the patent was *void*, and not merely *voidable*, and therefore raises no bar to the claim of the appellant: 1. It is void, because the law requires the patent to issue to the locator or his assignee. 1 *Rev. Code*, (Pleasants's edit.) p. 344, § 3. The assignment was not in due form, because *entries* are not assignable by law. The act speaks of *surveys* only. *Ibid.* p. 147, § 40. The act also requires a recital of the assignment in the grant. *Ibid.* 148, § 44. Therefore, the recital was false as to part of the assignment, which annuls the patent. 5 *Co. Rep. Berwick's Case*; 2 *Roll. Rep.* 274, 359. The assignment was forged, and crime cannot be the foundation of right. *Wilson v. Spencer*, 1 *Ran. Rep.* 76; *Cutting v. Carter*, 5 *Munf. Rep.*

2. A *scire facias* was not necessary to vacate the patent, because it was not merely *voidable*, but *void*. 22 *Vin.* 13, pl. 18; 2 *Leon.* 218; *Carth.* 436. Whatever is void at common law, may be either pleaded or given in evidence under the general issue. 2 *Wils.* 350; *Gilb.*

1824. *Evid.* 145; *Ball. N. Pri.* 173, note; 3 *Campbell*, 272; *1 Roll.* 188; 5 *Cam. Dig.* 643; *Wentw.* 432.

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6. A Court of Equity has jurisdiction to annul it on account of fraud. It will not support a plea, because that requires a valid muniment, and these patents are void. The circumstances of the case led to enquiry, which is considered equivalent to actual notice.

4. A tortious acquisition of the legal estate does not afford any protection. *Fag's Case*, 1 Vern. 52, may be objected to this proposition; but that case seems to be imperfectly reported. There was neither force nor fraud in that case. The constant practice disproves the doctrine supposed to be contained in that case. For, a third mortgagee, with notice of the second, cannot protect himself by purchasing the first.

On the part of the *appellees*, it was said, that the appellees have acquired the legal estate *honestly* and *fairly*, without notice of the claims of the appellant; and that a Court of Equity will not take it from them, even if the patents are at law *voidable*, and although there be full proof of the fraudulent assignment alledged in the bill.

1. The patents are not *void*, but only voidable at most; and if so, the legal estate passes. They are regular upon their face. The law is complied with, and they cannot be impeached either for *fraud* or *irregularity*. They can only be set aside in a proceeding for that very purpose. *Witherington v. M'Donald*, 1 Hen. & Munf. 309; *Nervell v. Camm*, 6 Munf. 233. The case of *Hamilton v. Wells*, was never authority, and if it was, it has been over-ruled by subsequent decisions. This principle has been sanctioned by all the Courts, State and Federal. In the Supreme Court of the United States, the case of *Polk's Lessee v. ———*, 9 Cranch, 87, supports the doctrine. In New York, the cases of *Jackson v. Ingraham*, 4 John. Rep. 163, and *The same v. Lawton*, 10 John. Rep. 23, are to the same effect. In Kentucky, *Bledso v. Wells*, 4 Bibb, 330; in North Carolina, *Rutherford v. Nelson*,

Hayw. 106; *Segra v. Parker*, Ibid. 104; *Dodley v. Hood-enpile*, Ibid. 359.

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A patent is a record, and imports verity. No averment inconsistent with it, can be received. Even a deed cannot be impeached at law for fraud in the steps leading to its execution. *Taylor v. King*, 6 Munf. 358; *Hynd's Case*, 4 Co. Rep. 71; & *Com. Dig.* tit. *Patent*, F. 1. All the cases cited on the other side, are founded on ancient statutes, and the King's *personal prerogative*. They are all cases in which the patent is void, on account of deception practised upon the King, and to his injury. 5 *Bac. Abr.* tit. *Prerogative*, 608; 3 *Reeves's History of Common Law*, 225. There is no pretence for saying that the Commonwealth has been injured. She has received her dues, and is not interested in the controversy.

It is said, that crime cannot be the foundation of right. This, however, is disproved by the cases of *Peacock v. Rhodes*, Douglas, 614; *Ashby v. Blackwell*, Ambler, 506.

2. The appellees acquired the legal title *honestly* and *fairly*, and without notice. There is no pretence of any actual participation in the supposed fraud. The appellant has neither *law* nor *equity* on his side. Not law; because, he is obliged to go into Chancery, and he cannot bring *trouver* for his surveys. Not equity; because the demand is a stale one.

The act against buying pretended titles is a good defence in this case; and *Clay v. White*, 1 Munf. 162, proves, that the appellees had possession in this case. *Morrison* purchased after the patents.

3. There is no proof of *forgery*, and the Court will not presume it.

In reply, it was said, that it was clearly proved, that the assignment to *Welch* was a forgery. The case is the same, as if the heirs of the real *David Duncan* were the complainants in equity. In this event, it could not be said, that the case would be that of two rival equities. A junior equity with the legal estate, can only succeed over a

1824. senior equity, where the source of the equity is pure. An
 January equity which is founded on a forgery, is of no weight;
 Morrison and the subsequent accession of the legal estate, cannot
 Campbell, give it any validity.

That, no title can proceed from a crime, is an undoubted principle of law. The case of *Peacock v. Rhodes*, which has been cited on the other side, is no authority for the position it was intended to prove, but was decided entirely on the nature of commercial instruments. In that case, it was not necessary for the party to trace his title to the wrong-doer. The case of *Ashby v. Blackwell*, Ambler, 506, is an authority in favor of the appellant; because, it was conceded, that the man whose name was forged, had his remedy against the bank. If *A.* endorses a note, when he is not the *A.* who has title to the note, his endorsement does not confer a title. *Meade v. Young*, 4 T. R. 28; *Chitt. on Bills*, 112. The rule is, that every man is bound to know the person with whom he deals. If it is difficult for an assignee to detect a forgery, on the other hand, it is impossible for the real owner to guard against it.

The appellees contend, that *Hicks* and *Campbell* were purchasers, without notice. But, of what were they purchasers without notice? Not of *David Duncan's* title, because they pretend that they have that title. They must mean that they had no notice of the forgery. But, this is not the meaning of the equitable rule. For example; a third mortgagee has a forged mortgage, without notice, and obtains possession of the legal title. This surely will not protect him.

The patent is void, and, therefore, they have not a good legal title. But, even if it be merely voidable, it is not such a title, as, within the rule in equity, will protect the purchaser.

It is said, that the appellant purchased a pretended title. But, the act of Assembly makes surveys assignable, which justifies the assignment, and acquits it of the imputation

of being a *pretensed* title. This was merely an executory agreement, and therefore, does not come within the law. *Sugd. (new ed.)* 348; 1 *Swanson*, 56.

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As to the right of the executors to sell, it is not put in issue in this cause. The will might be expunged from the cause, without injury to the complainant's case. It is too late to take exception to exhibits in this Court, when they were read in the Court of Chancery, without objection.

January 31. The Judges delivered their opinions.

Judge GREEN.

The first enquiry in this case is, whether the appellant has shewn himself to be entitled to the rights of *David Duncan*, of Pittsburg, in the subject in question, so as to be entitled to assert them against the appellees, who claim under *Welch*. He asserts, that *David Duncan* made his will, whereby he directed all his property, real and personal, to be sold by his executors: that, he purchased the land in question of *George Wallace* and *Abraham Kirkpatrick*, two of his executors: that, *Samuel, David, Hannah, Mary, and Margaret Duncan*, are the heirs of *David Duncan*; and it appears, from the paper exhibited as a copy of the will, that they are also his sole devisees, of the proceeds of the sale of the land in question. Due publication has been made as to those heirs and devisees, and *George Wallace* is dead, and the suit has abated as to him. *Kirkpatrick* answered, and admitted all the allegations of the bill. Some of the defendants claiming under *Welch*, do not deny these allegations. Others, saying they know nothing about them, call for proof; and others are infants, answering by guardian, and neither admitting nor denying those allegations. The appellant, in proof of those allegations, exhibits a paper, purporting to be a copy

* Judge CABELL, did not sit in this cause.

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of the will of *David Duncan*, recorded in Alleghany county, in Pennsylvania, certified by the Register of that county. But, from this, it does not appear, upon what proof the will was admitted to record. He also exhibits a contract between the said *Duncan* and *David Steel*, who conveyed the lands in question for *David Duncan*, and various other documents in relation to the said lands, which he alledges, were delivered to him by the executors of *D. Duncan*, and which *Kirkpatrick* also alledges. These papers could have been had no where, but from the representatives of *David Duncan*; also a paper purporting to be a copy of the proceedings and judgment in the name of *David Steel* against *Margaret Duncan*, executrix, and *Abraham Kirkpatrick* and *George Wallace*, executors of *D. Duncan*, deceased. This paper is certified by the Prothonotary of Alleghany county, in Pennsylvania, under his seal of office; but, it is not otherwise authenticated, so as to be strictly legal proof. Is this proof sufficient to establish the facts alledged by the appellant, upon which he founds his title as against the representatives of *David Duncan*? And, if so, is it sufficient also against the other appellees, claiming under *Welch*?

The act authorising proceedings in Chancery against absent defendants, prescribes, that after due publication: "If such absent defendants shall not appear and give such security, within the time limited, or such further time as the Court shall allow, upon good cause shewn, the Court may proceed to take such proof as the complainant shall offer; and, if they shall thereupon be satisfied of the justice of the demand, they may order the bill to be taken for confessed, and make such order and decree therein, as shall appear to be just, &c." This act passed as to absent debtors, originally in 1777, and was extended to other absent defendants in 1787; and it was not until 1792, that any mode was prescribed for giving notice to an absent defendant, whose residence was not known. From this, it appears, that "such proof as the complainant shall offer,"

spoken of in the act of 1777, was not confined to strict legal proof; for if it was, then, in consequence of the absence of the defendant, and his place of residence not being known, it would, in many cases, be impossible for the plaintiff to produce any such legal proof. His evidence might consist of the testimony of witnesses exclusively, and their testimony could not be strict legal proof, unless taken upon notice to the other party. The act of 1792, therefore, related, not to proceedings against originally absent defendants, proceeded against by publication under the acts of 1777 and 1787; but, to absent defendants, properly before the Court, upon process duly served, or by answer. Such proof as the act of 1777 alludes to, was not taken as the foundation of the decree; but, only to satisfy the Court, that, under all the circumstances of the case, the demand was just, and might be other than strict legal proof; and, being so satisfied, the Court was authorized then, and then only, "to order the bill to be taken for confessed," which was not the necessary consequence of the non-appearance of the defendant; and, thereupon, the decree was founded, not on the proof, but upon the admission of the bill *in omnibus*.

The inchoate right, which *David Duncan* had, at the time of his death, to the lands in question, was real, and not personal estate; and, if he had died intestate, would have descended to his heirs at law, and would not have passed to his personal representative. This interest could only have been devised by a will executed in the manner prescribed by the laws of Virginia for a will of lands; and, although it be not necessary to prove a will in a Court of Probate in Virginia, for the purpose of giving it effect as a will of lands, yet, it is necessary, when the fact is in issue, that he who claims under it should shew by proof in the cause, in which the claim is asserted, that it was executed with the solemnities required by the laws of Virginia, to give it the effect of a will of lands. This fact may be shewn, by producing a proper probate in a Court

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1824. of Probate in Virginia; or, if the will has not been so
January. proved, by any other competent evidence, according to the
Morrison course of the common law. These points are fully dis-
v. cussed in the case of *Bagwell v. Elliott*, ante. If,
Campbell, therefore, in this case it was incumbent on the appellant to
&c. produce strict proof of the execution of the will, as a will
of lands, in Virginia, according to the laws of Virginia,
he would totally fail; for, in strictness, there is no legal
proof of the existence of the will, or of the manner of its
execution. But, according to the view I have taken of
our statutes, no such strict legal proof was necessary in
this case, as to the absent defendants; and, I think, that
the proofs exhibited were sufficient to satisfy the Court, of
the justice of the plaintiff's demand, and to justify the
taking of the bill as confessed, and decreeing accordingly.
The allegation of the plaintiff, admitted by the surviving
executor, and proved by the production of papers, in rela-
tion to *Duncan's* title, (which could not have been had
but from *Duncan's* representatives,) that he purchased
from the executors, authorised by the will to sell the land;
the act of the executors in taking upon them to sell; and
the acquiescence of the heirs and devisees of *Duncan* in
that sale, ever since 1806; are circumstances, which, in
this suit, as against *absent defendants*, justify the belief,
that the will was duly executed to pass lands, according to
the laws of Virginia; and that the executors sold the lands
in question to the plaintiff. If the will had only authori-
sed the executors to sell, it would have been necessary
that all should join in the sale, in order to effect a valid
sale; unless those who sold had previously qualified as ex-
ecutors in Virginia. But, the will authorises any two to
act, and any two were authorised to make a valid sale, by
force of the will, without any qualification as executors;
the act of 1785, ch. 61, § 42, being an enabling, and not
a prohibitory, statute. The act of 1777 seems to have
adopted the act of 5 George 2d, ch. 25, authorising bills
to be taken *pro confesso* after publication, in certain cases,

with this difference, that, under the English statute, the bill was taken *pro confesso* of course, and the decree accordingly followed, without any proof to satisfy the Court of the justice of the demand, either before or after the order for taking the bill *pro confesso*. The reason which induced the Legislature of Virginia to deviate, in this respect, from the provisions of the English statute, seems to be, that our act authorises publication against any absent defendant, who might never have heard of the demand; the English statute only authorises publication against defendants who had left the kingdom, or absconded and concealed themselves, to avoid the service of process in that very cause.

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The right of the appellant to the interest of *David Duncan* in the lands in question, being thus established, as against the heirs, devisees and executors of *David Duncan*, is sufficiently established against the appellees claiming under *Welch*; for, the only interest they can possibly have in that question is, that the decree in this cause shall exempt them from any new litigation with those heirs, devisees, or executors, in another suit. The decree in this cause, if in favor of the appellant, will have that effect, as it would be a complete bar to any new suit on their behalf; their only relief being, by setting aside the decree within seven years, as the statute prescribes. And if the heirs, devisees and executors of *David Duncan* had actually appeared and answered, admitting the case stated by the plaintiff; or, if all of them had been plaintiffs with *Morrison*, and had stated the case which he has stated, such admissions would have been binding, and the defendants claiming under *Welch* could not have controverted the fact, that *Morrison* had legally acquired *David Duncan's* rights. The legal proceedings which establish that fact against the heirs, devisees and executors of *David Duncan*, ought to have the same effect as their admissions of record, by bill or answer, would have.

1824. We come, then, to the merits of the case. No one can
 January. read this record, without being convinced that *David Dun-*
 Morrison can, of Pittsburg, was the real owner of the surveys, upon
 v. which the patents for the land in question issued; that he
 Campbell, never parted with his right; and that the assignment to
 &c. Welch, under which the appellees claim, was in effect a
 forgery.

It is not necessary to comment at large, upon the great mass of authorities cited in the argument of this case. It appears from those cases, and others not cited, that the favor shewn by a Court of Equity, to a purchaser for valuable consideration without notice, is founded on the rule, that where the equity is equal, the law shall prevail. Thus, a Court of Equity will not assist an equitable title, against a purchaser of the legal title for valuable consideration, without notice of the equity; for, both parties have equal equity. And, a purchaser for valuable consideration from one in possession, and having some interest in the subject of the sale, without notice of a prior equity, (whether the vendor professed to sell the legal title, or only an equitable interest,) may protect himself effectually by procuring, by any means, the legal title, after notice of the prior equity. And, that, because his equity originally acquired by the purchase is equal to the prior equity; and so, even if the purchaser has in such case acquired, not the legal title, but only a better right to call for the legal title. And, although the rule is, that where equity is equal and neither party has the legal title, nor a better right than the other, to call for it, *qui prior est tempore, potior est jure*; yet he who asserts such prior equity, or even a legal title, must establish his case without the assistance of the other party; for, a Court of Equity will not, in such case, compel a discovery. Thus far the cases have unquestionably gone, and one case has even gone further. The legal title being in a trustee, the owner of the equitable title devised it; but his heir at law entered into possession,

and sold to a purchaser for valuable consideration, without notice of the will. The trustee refused to assert his legal title, for the benefit of the devisee, and the latter applied to a Court of Equity for relief, which was refused. But, a case contradicting this, is reported in 18 *Vin. Abr. tit. Purchaser, C. pl. 15.* A mortgaged land to B. and afterwards, by his will, (having two sons, C. and D.) devised the equity of redemption to D. B. and C. join in an assignment of the mortgage to E. who pleaded want of notice of the will, and that C. was the visible heir; yet decreed, that D. should have the equity of redemption, on the foot of the first mortgage. The first of these cases was determined upon the principle, that the testator, having the equitable right, which, but for the will, would have descended to his heir at law, the purchaser from the heir at law in possession, without notice of the will, thereby acquired an equal equity with that of the devisee; in like manner as if the testator himself had, instead of devising, conveyed the equity and afterwards sold to the purchaser without notice of the former conveyance; the heir at law completely substituting the testator. The other case denied that the purchaser from the heir without notice of the will, had thereby acquired any equity, or an equal equity with the devisee; the heir never, in fact, having had any interest in the subject, by the purchase of which, the purchaser could acquire any equity. The utmost extent to which the cases have gone, is, that he who purchases of one in possession, having some interest in the subject, or who, or whose ancestors once had an interest in the subject, which, but for the secret title not known to the purchaser, would have passed to him, thereby acquires an equity which may be protected by the acquisition of the legal title in any way. But, no case has yet occurred, in which it has been decided, that a purchaser without notice, from a mere stranger, who never had, and whose ancestors never had, any interest whatsoever in the property, gave any equity whatsoever to the purchaser.

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1824. The case of the bank stock transferred upon a forged power of attorney, in which Lord *Hardwicke* gave relief against the transferee, was decided upon general principles of law and equity. The subsequent case, in which relief was given in favor of the owner against the bank, proceeded upon the ground, that the rules of the bank had bound the bank to make good the loss, and their negligence in permitting the assignment, without the proof as to the authenticity of the power of attorney, which their own rules required. If the bank had not been so responsible, no doubt but the purchaser, although he had acquired the legal title, without actual fraud on his part, would have been, according to Lord *Hardwicke's* decision. The true owner could not, in any event, have lost his property by the forgery. The purchaser would be bound to enquire as to the right and authority of the person with whom he dealt, to transfer the property belonging to another, and would have borne the consequences of his gross negligence in that respect, if the bank had not taken upon themselves that duty and responsibility. Gross negligence is, in equity, equivalent in its effects, to fraud or notice. Ignorance as to the identity of the person with whom the party deals, or of the authenticity of the title papers under which he purchases, proceeds in all cases from gross negligence; for, the facts in respect to those circumstances could be ascertained with reasonable diligence, in all cases. A purchaser ought to be required to look to these points at least, at his own peril. *Meade v. Young*, 4 T. R. 28.

In the case at bar, the papers under which *Hicks* and *Campbell* and the *Curries* purchased, shewed, that the original entries and surveys belonged to *David Duncan*, and it was his equitable or inchoate right to the land, which they designed to purchase. They had full notice of his title. With reasonable diligence they might have ascertained who was the real owner of the property, and whether the assignment to *Welch* was genuine or a forgery. They purchased without any such enquiry, and were

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guilty of gross negligence. Neither *Welch*, nor any claiming under him, acquired by their respective purchases, any equity whatever, to be set up in opposition to that of *David Duncan* and those claiming under him. None of them purchased a legal title. Their rights, in equity, must be determined according to the state of things at the time of the purchase, and cannot be varied by the subsequent acquisition of the legal title, without any further valuable consideration. If the appellees claiming under *Welch* could succeed in this case, then, upon the same principles, if one mortgaged his land, and another, personating him, sold the land for valuable consideration to one who believed that he was dealing with the true owner, and the purchaser afterwards purchased the mortgage and thus acquired the legal title, the true owner could not redeem, but would lose his estate forever, without remedy.

In equity, he who has acquired the legal title to the prejudice of another who has the better equitable right, is a trustee for the latter.

David Duncan's rights were never forfeited in fact to the Commonwealth. The surveys were returned and the patent issued in due time; and the patentees, who, by taking out the patent, made it impossible for those claiming under *David Duncan*, to derive any benefit from a return of other copies of the surveys to the Register's office, (for, they could not, if that had been done, have gotten patents,) cannot repel the claims of the appellant, upon the ground, that if they had not taken out the patents, *David Duncan's* rights *might*, or *would* have been forfeited. As soon as they took out the patents, they were trustees for those claiming under *David Duncan*; and the rights of the parties could not be varied by the failure of those representatives to do an absolutely fruitless and vain thing, that is, to return the surveys again to the office.

Neither does the plea, that the plaintiff was a purchaser of a pretended title, avail the defendants. It is not necessary to investigate the general doctrines upon that subject

1824. in this case; since, whatever they may be, they do not ap-
January. ply in the present instance. The right of *D. Duncan's*
Campbell representatives was equitable and not legal. There can
v. be no disseisin of an equity; 1 *Meriv.* 357 Nor any pos-
Morrison, session adverse to an equitable estate, unless it be at the
&c. same time adverse to the legal estate, upon which the equi-
table estate depends. *Ibid.* If another had disseised the
patentee, the possession of the disseisor would have been
adverse, both to the patentees and the representatives of
D. Duncan. But, the patentees having obtained the legal
title, to which those representatives were in equity enti-
tled, were trustees for them, and they might make a valid
transfer of their equitable right.

The decree should, therefore, be reversed, and the hol-
ders of the legal title of the lands in question, declared to
be trustees for the plaintiff, and decreed to convey to him,
upon his paying to them respectively, such sums as they
have expended in taking out the patents, and in the pay-
ment of taxes on the lands.

Judge COALTER.

On the merits of this case, I think the decree is errone-
ous and must be reversed.

At the time the appellees made their purchase, the le-
gal title of the lands was in the Commonwealth; and the
equitable right, under the entries and surveys, was in the
heirs of *Duncan*, who procured those entries and surveys
to be made. And, although the appellees, or those under
whom they claim, have since acquired the legal title from
the Commonwealth, by virtue of the fraudulent or forged
assignment, (relied upon and exhibited with the answer,
and procured by *Welch*, under whom they claim,) they
never had any transfer from *Duncan*, the true owner, of
his equitable rights, binding on him and his heirs. A le-
gal title, acquired under such circumstances, can be no bar
to the equity of *Duncan*, or those claiming under him,

any more than such title, if acquired by *Welch* himself, would be a bar to that equity. They can only stand in his shoes. They have no right to stand in the situation of a subsequent purchaser of an equity, who unites with that equity the legal title, before notice of a prior purchase. In that case, both parties acquire the rights of the owner, and each has a remedy against him. But, the parties in this case, presuming them to know the law, had notice that all was not regular on the part of *Welch*, and ought, therefore, to have enquired. The assignment made to *Welch* by the pretended *David Duncan*, was of the *entries*, not of the *surveys*: This assignment was made after the surveys, at which time, as I understand the law, no one was entitled to copies of the surveys, except the true owner; and, as they are made assignable by law, this was doubtless intended, amongst other things, to prevent fraudulent assignments. But, every person is entitled to a copy of the entry. 2 *Rev. Code*, (new edit.) p. 368. *Welch* perpetrated the fraud, by procuring these, and an assignment of them, after they had been reduced to surveys, when the surveys themselves ought to have been assigned, in order to entitle the assignee to a patent. By this means, he probably practised a fraud on the surveyor, who, perhaps, supposing him the owner, gave him copies of the plats. He also practised one on his assignees, and finally on the Register, who issued grants, although there was no actual assignment on the surveys, as the law requires. So, that if there was any doubt about my first position, I think the appellees, or those under whom some of them claim, were bound to notice this irregularity, and to take the consequences.

Warrants and surveys are made assignable by law, and where a patent issues to the assignee of a plat, the assignment is to be stated in the patent. 2 *Rev. Code*, p. 371 and 372. There is no law, that I can find, authorising an assignment of an entry. Such assignments, however, I believe, have been common, and held a good transfer of

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1824. the equitable title, so as to enable the assignee to make a
January. survey in his own name. But, after the entry has been
Morrison reduced to a survey, then the regular course is, for the
Campbell, party to get a copy of his survey, and to assign it, the en-
&c. try being now *functus officio*. 2 *Rev. Code*, 369.. In
 regard to the survey, the act provides, that within three
 months after making the survey, the surveyor shall deli-
 ver to his employer or his order, a true plat and certificate
 of survey, who shall, within 12 months, return the same
 to the Register's office, *Ibid.* p. 370; and that no surveyor
 shall, at any time within 12 months after the survey made,
 issue or deliver any certificate, copy or plat of land by him
 surveyed, except only to the person or persons for whom
 the same was surveyed, or to his, her or their order, unless
 a *caveat* shall have been entered, &c., to be proved by an
 authentic certificate of such *caveat*, &c. *Ibid.* p. 372.

It might seem, from this, that after 12 months, any per-
 son might get a copy of the survey; but, as various acts
 of Assembly, passed from time to time, extended the time
 of making returns of surveys to the Register's office, I be-
 lieve the sound construction of the act, and the practice of
 the surveyor under it, was, not to deliver copies of plats
 to any but the owners, so long as they had time to return
 the same, unless in case of *caveat*, as aforesaid. Be this,
 however, as it may, an assignment of the plat was neces-
 sary, in order to entitle the assignee to a patent, which
 must recite the assignment as aforesaid.

As to the other points in this case, whether the appel-
 lant has sufficiently deduced his title from *David Duncan*,
 and the ground stated in the decree for dismissing the bill,
 I am of opinion, for the reasons stated by the Judge who
 has preceded me, that the decree cannot be supported on
 either of those grounds. It must, therefore, be reversed,
 and the decree entered which has been prepared.

Judge BROOKE, concurred; and the following decree
 was entered:

The Court is of opinion, that the assignments, which James Welch claimed title to the surveys in the proceedings mentioned, made for David Duncan and David Duncan & Co., of Pittsburg, being made by one having no title thereto; neither the said Welch, nor his assignees, nor the assignees of his assignees, acquired by their respective purchases thereof, any equity which a Court of Equity ought to respect, when opposed to the rights of David Duncan, or of those claiming under him; and that the subsequent acquisition of the legal title, without further consideration paid by the said assignees, could not better their case; that, therefore, those to whom the patents issued, were, thereupon, in equity, trustees for those claiming under the said David Duncan, and cannot avail themselves of the omission of the rightful owner of the land, to assert his claim at an earlier period; and, that the objection, that the appellant was a purchaser of a pretended title, is also unavailable to the appellees claiming under Welch; that the appellees, respectively, in whom the legal title to any of the lands in the proceedings mentioned is vested, should be decreed to convey the same, with special warranty to the appellant, upon his paying to them, respectively, any sums of money which they may respectively have paid, for the costs of taking out the patents for those lands, or may have paid for taxes upon the same; the amount of which should be ascertained under the direction of the Court of Chancery; and that the said decree is erroneous, &c.

1834.

January.

Morrison

Campbell,

&c.

1824.
February.

MARIA and others v. SURBAUGH.

Where a testator bequeaths a female slave, upon condition that she shall be free at a certain age, and before that period arrives, she has issue, such issue are slaves.

This was an appeal from the Superior Court of Law for Greenbrier County.

An action for freedom was brought, *in forma ptruperis*, by *Mary*, who sued for herself and on behalf of her four children, *Maria*, *Nancy*, *Solomon* and *Samuel*, against *David Surbaugh*. Plea, *not guilty*, and issue. On the trial, the jury found a special verdict, stating, in substance, the following case:

That the plaintiff *Mary*, was the property of *William Holliday*, deceased, who made and published his last will, on the 17th day of June, 1790, and died in the same year. The clause in the said will, on which this question arises, bequeaths his slave *Mary* to his son *William*, with a declaration, that she shall be free as soon as she arrives at the age of thirty-one years. After the death of the testator, his son *William Holliday*, the legatee, became possessed of the plaintiff *Mary*; and, afterwards, on the 15th of March, 1804, *William Holliday* sold her to a certain *John White*, who afterwards sold her to one *Gilkeson*. The latter sold her to *Benjamin Carman*, who sold the said *Mary* and her infant child, to the defendant, *David Surbaugh*. That infant child is the plaintiff *Maria*. Since *Mary* was purchased by the defendant *Surbaugh*, she has had the following children, viz: *Nancy*, *Solomon* and *Samuel*; who are plaintiffs in this cause. On the first day of September, 1818, *Mary* became 31 years of age. The plaintiffs *Maria*, *Nancy*, *Solomon* and *Samuel*, were all born after the sale of the said *William Holliday* to *John White*, as aforesaid, and before the plaintiff *Mary* arrived at 31 years of age.

On these facts, the jury submitted the law to the Court. 1824.

The Court gave judgment, that the law was for the plaintiff *Mary*, that the children *Maria, Nancy, Solomon* and *Samuel*, were not entitled to their freedom; and that as to them, the law was for the defendant. *February. Maria, &c. v. Sarbaugh.*

The plaintiffs appealed.

Nicholas, for the appellants.

Leigh, for the appellee.

February 2. The Judges delivered their opinions.*

Judge GREEN. I agree with the Counsel of the appellee, that in deciding upon questions of liberty and slavery, such as that presented in this case, it is the duty of the Court, uninfluenced by considerations of humanity on the one hand, or of policy (except so far as the policy of the law appears to extend) on the other, to ascertain and pronounce what the law is; leaving it to the Legislature, as the only competent and fit authority, to deal as they may think expedient, with a subject involving so many and such important moral and political considerations.

It is alledged on the part of the appellee, that an emancipation by will is, in effect, a bequest of the testator's property in the slave, to the slave intended to be emancipated: that, in the case at bar, the legacy did not vest until the legatee attained her age of 31 years; and that, if she had died before she attained that age, the legacy would have lapsed, and the bequest have had no effect whatever; and that, consequently, until she attained the age of 31, (the property not being changed,) the mother continued a slave, and her children born before that period, were born slaves, and so continue, by force of the rule, that the children follow the condition of the mother.

Judge COALTER did not sit in this case.

1824. This conclusion would be just, if the preliminary proposition were true, and emancipation was, in effect, a transfer of the property in a slave, to himself. But, in that event, another consequence would in this case follow; to wit, that the legacy having in fact vested in the mother, the property in the children would also be vested in her. By the common law in relation to animals, the owner of the female is entitled, *jure dominii*, to the increase. It may, perhaps, be doubtful, whether, according to the common law, especially in ancient times, even the temporary owner of the female, was not entitled, absolutely, to the increase. But, however this may be, there is now no question in Virginia, but that in relation to slaves, the increase born during the continuance of any temporary interest in the mother goes, as she does, to the person entitled to the absolute property in the mother, after the expiration of the temporary interest, unless otherwise directed by the original owner of the female. This was decided as a general proposition, independent of any statutory provision, in *Ellison v. Woody*, 6 Munf. 368, and might be proved by reference to the uninterrupted practice of the country for more than an hundred years, under the statute prescribing the interest of a widow, in various cases, in her husband's slaves; many of which direct, that her portion of slaves shall go after her death, to the heir, distributees or legatees, as the case may be, without any directions as to the increase, born during the continuance of the widow's interest. *Acts* 1705, chap. 23, § 11; 1727, chap. 11, § 21; 1785, chap. 61, § 21-25. Yet, it has invariably been held, that the increase goes to the person entitled to the original stock, after the life-estate expired. And this rule has become common law to us. The consequence is, that if the testator gave the property in *Mary* to his son, until she attained the age of 31, and afterwards to herself, the son was entitled to her issue until she attained that age, and she then became entitled to them.

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But, I cannot assent to this proposition. No man can take or hold a property in himself. If he could, he might sell himself, and, by his own act, become a slave. Emancipation is an utter destruction of the right of property. If it be conditional or future, the condition being performed, or the time come, then, and not till then, the right of property is wholly gone. Before any rule of property can be applied to any person, his civil state must be ascertained, and when, and not before, he is ascertained to be a slave, he becomes a proper subject of the rules of property.

The question as to the civil state of the children of *Mary*, born before she attained her age of 31, depends upon the true construction of the statute of 1753, which was in force at the time of their respective births, and which provided, "that all children shall be bond or free, according to the condition of their mothers, and the particular directions of this act." The latter part of this clause has no direct application to the case at bar; for, the act gives no particular directions applicable to this case. In the case of an emancipation, upon a condition or contingency, or at a future period, and children born, pending the condition or contingency, or before the time appointed for the emancipation to take effect, this act is susceptible of various constructions. 1. If the right to freedom in the mother be contingent, or depending upon a condition, the children may be considered as born slaves, (their mother then being a slave,) and not entitled to the benefit of the contingency or condition, upon which the mother would be entitled to her freedom; or, 2. They may be considered as born slaves, but with all the rights of the mother to be free, upon the happening of the contingency, or performance of the condition; or, 3. They may be considered as born slaves, but upon the condition being performed, or the contingency happening, the mother being free, the children may be deemed free from their birth, by relation; or, 4. If the mother is to be emancipated at a future time, the children may be considered as born slaves,

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1824. without the benefit of the right of the mother to future liberty; or, 5. With that right; or, 6. They may be considered as born free, upon the supposition that a vested right to future freedom in the mother, puts her in the condition of one free, but bound to service for a limited time. No case has occurred, in which these questions have come under the consideration of the Court of Appeals, except that of *Pleasants v. Pleasants*, 2 Call, 319. That case was presented under such circumstances, as to invite the attention of the Court to each of those alternatives in the construction of the statute of 1753; and, though the Court did not expressly refer to the statute, they must, of necessity, have considered all the questions which could arise upon its construction. For, in that case, some of the slaves were born of mothers who had a contingent right to freedom, before the contingency happened, and some, of mothers, who, after the happening of the contingency on which their right to freedom depended, were not immediately free, but entitled to their freedom at a still future and fixed period. The case was this: *John Pleasants* died in 1771, when a law was in force, which prohibited the emancipation of slaves, except by permission of the Governor and Council, and for meritorious services. By his will, he bequeathed his slaves to the members of his family, with a direction that, so soon as it should be allowed by law, his slaves then (at the making of his will,) born, or thereafter to be born, whilst their mothers should be in the service of the testator, or his heirs, should be free at the age of 30 years. In 1782, a law passed, permitting emancipation. Chancellor WYTHE decreed, that such of the slaves as were of the age of 30 years, when the law of 1782 took effect, were then (at the passing of the law,) entitled to their freedom: (these, of course, were born before the testator's death;) that, those born before the testator's death, and not 30 years old at the time of the decree, would be entitled to freedom when they attained the age of 30. The principle of this branch of the decree, ex-

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tended to those born in the testator's life-time, and who attained the age of 30 years after the passing of the act of 1782, and before the decree, although this class was not expressly provided for in the decree: that, those born since the statute was enacted, were born free; and, that *those born between the time of the testator's death, and the passing of the act, would be entitled to freedom when they attained the age of 30.* This last branch of the decree did not distinguish between those born, during that period, of mothers over or under the age of 30, and is not noticed in Mr. Call's report of the case. Judge ROANE was of opinion, that as to all the slaves *in esse* at the time of passing the act of 1782, without regard to the time of their birth, whether before or after the testator's death, such of them as were then (at the passing of the act,) of the age of 30, were immediately, upon the statute taking effect, free; such were, of course, born before the testator's death; and, such of them as were under that age, were entitled to their freedom when they should arrive at the age of 30: (Of these, some were born before, and others after, the testator's death:) That, the right to freedom vested in them upon the passing of the act; and that such of them as were then under the age of 30, thereby became free persons, bound to service until the age of 30: that, their children, born after the act of 1782, being born of free persons, were free; and that the testator had no power to control their liberty, by binding them to serve until the age of 30, as the will prescribed. Judges PENDLETON and CARRINGTON, agreed in a decree, that the slaves born before the testator's death, and then (at the time of the decree,) over 30, were free at the time of the decree; (and, consequently, that those over 30, at the passing of the act, were then free:) that, all born before or after the testator's death, then (at the time of the decree,) under the age of 30, should serve until they attained that age, and then be free; and that all the descendants of the females, in all generations, born of mothers, under the age

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1824. of 30 at the time of their birth, should serve until they
February. attained the age of 30, and then be free. This last provi-
Maria, &c. sion of the decree was avowedly founded wholly on the
v. directions of the will to that effect; and no other reasons
Surbaugh. were assigned for it. The construction, therefore, which
 was given to the statute, in this case, was as follows:
 1. That, a testator might emancipate upon a contingency,
 and that the children born of mothers who were to be free
 upon the happening of the contingency, and before the
 contingency happened, were born slaves, and were not en-
 titled to the benefit of the contingency upon which the
 mother was to be entitled to her freedom, so as to be free
 upon the happening of the contingency; nor were to be
 considered as born free by relation. For, all the Judges
 agreed, that those born after the death of the testator, and
 before the passing of the act, were bound to serve until the
 age of 30. The two Judges, whose opinion decided the
 cause, declared, that this service was imposed, in pursu-
 ance of the will of the testator; and although the other
 two assigned no reason, they must have proceeded on the
 same ground; for, this obligation to service could not arise
 from the condition of the mother, if the children followed
 that condition, so as to be entitled to the benefit of the con-
 tingency, upon which she was to be free; for, in that case,
 they must have been born, to be free at the same time, and
 under the same circumstances, when, and under which,
 she acquired her liberty; and, if so, then the testator had
 no power to impose upon them a service, from which the
 law exempted them, from their birth.

If it should be said, that the right to liberty, being de-
 rived only from the testator's will, must be taken with all
 the modifications and conditions imposed by the testator,
 and that as he may give a female slave to one, and her fu-
 ture increase to another, that for the same reason he may
 emancipate a slave *in futuro*, and either direct her future
 increase to serve for a limited time, or to remain absolute
 slaves, notwithstanding the law has declared that the chil-

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dren shall follow the condition of the mother, and of course, be free when she would be free, if her future right to liberty was a part of the *condition* referred to by the law; I answer, that the power of an owner to give a slave to one, and her future increase to another, results from the right of property, which the owner has in the accessions to, and increase and produce and issues of, his property, over which he may exercise an absolute control for a time, limited only by the policy of the law to prevent perpetuities. But, in case of emancipation of the mother, the law prescribes that the children, from their birth, shall be bond or free, according to the condition of the mother; and the testator can no more control the effect of the law, if it gives future freedom to the children, in case the testator had been silent on the subject, than he could give his property upon a condition not to enjoy or alienate it. If he could, he might on the same principles, give immediate freedom to the mother, and direct that her future issue should serve until a given time, or be slaves forever; or he might give to a slave, freedom for a limited time, and direct effectually, that he should again be a slave, after the lapse of that time; propositions, which cannot be maintained, and which are condemned both by the common and civil law, as will be hereafter seen.

It follows, that they were, in the opinion of all the Judges, born absolute slaves, and would so have continued forever, but for the efficacy of the will in emancipating them also, at the age of 30.

2d. That a testator might emancipate at a given future time; and the two Judges whose opinions decided that cause, thought that in such case, the children born of mother absolutely entitled to be free at a future fixed period, and before that period arrived, were born slaves, the mothers being slaves at the time of their births, and were not entitled to the right of future liberty which the mother had. For, they decreed, that the children, born after the passing of the act, and to be born in all future time of mo-

1824. February. *María, &c. v. Surbaugh.* others under the age of 30, were bound to service until the age of 30, in pursuance of the will; which, for the reasons before stated, could only have been in consequence of their being born absolute slaves forever, and emancipated at the age of 30 by the will of the testator. Upon this point, the *Chancellor* and Judge ROANE were of opinion, that so soon as the right of the mother to future freedom became certain, she was free, and her children born free; and that the testator had no power over, and could not impose any service on, them.

The result, then, of this case is, that according to the opinions of all the Judges, the "condition of the mother," which was to decide whether her children should be bond or free, was the actual civil state at the time of their birth, as slave or free, without regard to her right to, or hope of, future liberty. Even the *Chancellor* and Judge ROANE would have thought the children absolutely slaves, if the mothers had been slaves at the time of their birth, with a right to future liberty.

The case at bar is one, in which the right of the mother to freedom at her age of 31 years, was unconditional and certain; and as the Judges differed as to the effect of such a state of the mother upon her children, and the case of *Pleasants* and *Pleasants*, may not be considered as conclusive authority in point, as to that question, it may be necessary to examine it, upon the principles of our laws in relation to this subject.

A short review of the history of slavery and servitude in Virginia, and the laws relating thereto, will throw light upon this subject. Negro slaves were first introduced here in 1620. No law was enacted in relation to their civil condition until 1662. They were held as absolute property, and the children of female slaves were held to be slaves, without doubt, until the question was raised, (probably in reference to the English law of *villénage*, by which the child of a freeman by a *neif* was held to be free,) whether the child of a freeman by a female slave was bond or free.

To solve this doubt, the act of 1662 was made, reciting that, "whereas *some* doubts have arisen, whether children got by an Englishman upon a negro woman, should be slave or free." It was enacted, that all children born in this country shall be held bond or free, according to the condition of the mother. The phraseology of the act shews, that the rule which had before prevailed, was adopted; a rule, conforming to the civil law as to slaves, and contradicting the rule of the common law as to *villains*. This law was re-enacted in 1666, without the preamble; and afterwards re-enacted repeatedly; and, finally, in 1753, with the addition of the words "and the particular directions of this act." In 1670, an act passed, declaring that "all servants, not being christians, imported into this colony by shipping, shall be slaves for their lives; but what shall come by land, shall serve, if boys or girls, until 30 years of age; if men or women, 12 years and no longer." This latter clause related to Indians. In 1691 an act passed, directing that the children of any woman servant, or any free christian white woman by negroes or mulattoes, shall be bound out as servants, until they attained the age of 31 years; re-enacted in 1705 and 1753. An act of 1723 provided, that the children of any female mulatto (referring to the acts of 1681 and 1705) or Indian, (referring to the act of 1670) bound to serve until 30 or 31, shall serve the master or mistress of such female, until they attain the age to which their mother was bound to serve. This act was re-enacted in 1753, and continued in force, as well as that of 1691 and 1705, until 1765, when they were repealed, and the children of servants; or of free white christian women by negroes or mulattoes, were directed to be bound out, the males until 21, the females until 18; and the children of mulatto women, bound to serve until 31, (by the acts of 1691 and 1705,) were to serve the master or mistress of such mulatto woman, the males until 21, the females until 18.

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1824. The act of 1753, re-enacting that of 1662, with the ad-
February. dition of the words "and the particular directions of this
Maria, &c. act," had in it a provision in the terms of the act of 1723,
v. in relation to the children of mulattoes bound to service,
Surbaugh. until they attained the age of 31, requiring such children
 to serve to the age to which their mothers were bound to
 serve, and it is to this provision that the words "and the
 particular directions of this act" referred.

From the first introduction of slaves into Virginia, the
 owners of slaves, without any statutory provision upon the
 subject, seem to have exercised an unlimited power of
 emancipation, until 1696. For, many laws were made be-
 fore that time, in relation to free negroes; and in that year
 a law was made, reciting many inconveniences arising
 from free negroes, and providing, that whosoever eman-
 cipated a slave, should transport him from the Common-
 wealth; or, on failure to do so in six months, he should
 be transported by the church-wardens; and that the for-
 mer owner should pay to them £10 for defraying the ex-
 pense of transportation. This act did not limit or restrain
 the power of emancipation. But, in 1723 it was enacted,
 that no person should emancipate a slave but for merito-
 rious services, and by permission of the Governor and
 Council. This act continued in force until 1782, when
 an act passed, authorising any owner of slaves, by deed or
 will, to emancipate such slaves, "who shall, thereupon,
 be entirely and fully discharged from the performance of
 any contract entered into during servitude, and enjoy as
 full freedom as if they had been particularly named and
 freed by this act;" provided always, "that all slaves so
 set free, not being in the judgment of the Court of sound
 mind and body, or being above the age of 45 years, or be-
 ing males under the age of 21, or females under the age
 of 18 years, shall respectively be supported and maintain-
 ed by the person so liberating them, or by his or her es-
 tate;" or in default, the Court might order a distress on
 his estate for that purpose.

Upon these acts, I observe, that Indians and the children of white women by a negro or mulatto bound to serve until 30 or 31, were considered free and not slaves, and bound as servants. For, the direction of the acts of 1691 and 1705 is express, that they shall be bound as servants. Their children were born free, and liable to no sort of service to the master of the mother, until the act of 1723 was passed. If the act of 1662, re-enacted in 1696, declaring, that all children should be bond or free, according to the condition of the mother, had been construed to give to the children of a mother, entitled to her freedom at a future day, or upon a contingency, the benefit of her right, so as to be free when she was, though born slaves; then the children of a servant, for the same reason, though born free, would be bound, as she was, to service, until she was entitled to be discharged from service. But they were not so bound; from which I conclude, that the civil state of the children, with all its consequences, was determined by the civil state of the mother, at the time of their birth, without regard to the present obligation of a free woman, to serve, or the present right of a slave to be free thereafter. And such was the reasonable construction of the statute of 1662; for it recites, that some doubt existed, whether children of an Englishman, by a negro woman, were *slaves* or free, and directs, that all children shall be deemed to be bond or free, according to the condition of the mother, that is, slave or free, as the mother at their birth was. The sole enquiry then, is, whether, at the time of the birth of the children, the mother be in fact slave or free, without regard to what may be her future state. The opinion of Chancellor WYTHE and Judge ROANE, that a present right to future freedom, is present freedom, with an obligation to serve as a servant; would directly counteract the policy of the law of 1782, in regard to emancipation, unless the former owner was bound to support the children born during the period of service of the mother, the males, until they attain the age of 21,

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1824. and the females, until the age of 18. That act provides,
 February. that all such children emancipated, shall be so supported.
 Marin, &c. The children of a free person not bound to any service, in
 v. Surbaugh. general, would not be a burthen upon the parish, for
 the parents would be bound, and commonly able to support them. But, the children of a free person bound to service, must be supported by the parish, for the parent cannot have the means of supporting them. The former owner could not, upon such a construction, be bound to support them; for, he did not emancipate them, they being born free. The consequence, then, of this construction would be, that the public, in consequence of the emancipation of the mother, with an obligation to future service, would inevitably be burthened with the support of the children, until they arrived to an age when they could be bound out as apprentices, which seems to me to be contrary to the policy of the law. Another consequence of such a construction would be, that a slave, so emancipated, male or female, whilst bound to service, would have all the privileges of a free negro, might acquire and enjoy property, sue and be sued, and even maintain litigations in a Court of Justice with his master; and be liable to be tried and punished for offences, as a free person, and not as a slave;—a state of servitude, directly against the policy of the law of 1765, the object of which seems to have been, to allow no middle state between slavery and absolute freedom, except apprenticeship during infancy. Again; as no person can, of his mere will, bind a person born free, to service, so I apprehend, that the owner of a slave, having made him free at present, cannot bind him to any future service, such an obligation being inconsistent with the grant of present freedom. Such an attempt would be nugatory upon principles of common law, and repugnant by the terms of the statute of 1782; for he would not, from the time of emancipation, “enjoy as full freedom as if he had been particularly named and freed by that act.” And both by the civil and common law, a slave or *villain*, the

moment he was manumitted in any way, was out of the power of the master forever. *Libertas ad tempus dari non protest. Ideoque si ita scriptum sit, usque ad decem annos liber esto, temporis adjectio supervacua est.* *Dig. Lib. 40, tit. 4, § 33-34; Vin. Abr. tit. Villein, K. pl. 8.* And finally, the law authorising emancipation by will, if it attached any consequences to an emancipation by will, contrary to the will of the testator, would frustrate itself; and the consequence would be, that if the will could not, according to law, have the effect which the testator intended, it would be void and of no effect. Could it be said, if a testator devised that a female slave should be free at the age of 30, and that her issue in the mean time should belong as slaves to his family, that his will which intended to confer future freedom, did in fact confer, in spite of his expressed intention, immediate freedom on the mother, and thus frustrate the intent of the testator as to the children, by giving them a birth-right to liberty? This would be to emancipate by law, and not by will. The testator, in the case at bar, having given a slave to his son in general terms, and directed that she should be free at the age of 31, intended to give her, and that he should have power over her as a slave. That intent was lawful, and should be carried into effect.

Upon the whole, I am of opinion, that the children of *Mary* were born slaves, without any right to future liberty. And, this is in strict conformity with the civil law, which may have been in the contemplation of the Legislature, when they passed the law of 1662, and the subsequent acts to the same effect. By that law, the civil state of the child was determined by that of the mother, at the time of the birth. "*Servi aut nascuntur aut fiunt. Nascuntur ex ancillis nostris.*" *Inst. Lib. 1, tit. 3, § 4.* They might be emancipated in futuro upon a condition, or at a certain time, and, in the mean time were not free, but slaves. "*Si in diem autem libertas data est, vel*

1824. *sub conditione, tunc competit libertas cum dies venerit, February. vel conditio extiterit.*" *Dig. Lib. 40, tit. 4, § 23.* "*Statuliberum medio tempore servum heredis esse, nemo est Maria, &c. qui ignorare debeat; ea propter noxæ dedi poterit.*" *Surbaugh. Dig. Lib. 40, tit. 7, § 9;* and they were called *Statuliberi* until they were actually free. "*Statuliber est, qui statutam et destinatam in tempus vel conditionem libertatem habet.*" *Dig. Lib. 40, tit. 7, § 1, and Lib. 40, tit. 1, 2, 3, 4, 5, 6, passim.* The children born of a woman in this condition, were slaves to her then owner. *Statulibera, quicquid peperit, hoc servum heredis est. Dig. Lib. 40, tit. 7, 16.* And, so strict was this rule, that if a female slave were bequeathed to another, to be by him set free at a future time, or upon a condition, and the time had come, or the condition been performed, but the slave not actually manumitted, and, thereafter, before an actual emancipation, had a child born, the child was a slave belonging to the person bound to manumit. But, in that case, he was bound to transfer the child to the mother, that he might be, by that means, set free. *Dig. Lib. 40, tit. 5, § 13.* A *statuliber* was, in almost all respects, in the same condition as other slaves. "*Statuliberi a ceteris servis nostris, nihilo pene differunt. Et ideo quod ad actiones vel ex debito venientes, vel ex negotio gesto, vel ex contractu pertinentes, ejusdem conditionis sunt statuliberi cujus cæteri. Et ideo in publicis quoque judiciis, easdem pœnas patiuntur quas cæteri servi.*" *Dig. Lib. 40, tit. 7, § 29.*

I cannot perceive the reason (for none is assigned,) upon which Chancellor WYTHE and Judge ROANE distinguished the case of a slave emancipated upon a contingency, and one directed to be free at a future period, as to the state of their children born before the contingency happens, or the appointed time comes. The contingent right to future freedom, is as much a part of the condition of a slave, as a certain right to future freedom is; and, if the

children were entitled, in the one case, to participate with their mother in this benefit, it seems to me, they ought in the other. But, if any distinction can exist between the two cases, it cannot apply to the case at bar; for, here the testator wills, that *Mary* "shall be free as soon as she arrives at the age of 31 years;" and, whether she would live to that age, was contingent and uncertain.

It may be further observed, that an act which passed in 1806, may be considered as a Legislative construction of the pre-existing laws on this point, and a recognition of the proposition, that a slave emancipated *in futuro* continued to be a slave, until the appointed time came. That act provided, that "if any slave, hereafter emancipated, shall remain in this Commonwealth more than twelve months after his or her right to freedom shall have accrued, he or she shall forfeit all such right," and be sold, &c. This act was passed with a full knowledge, that emancipations to take effect at a future time, were most common for making a provision for the children, and especially the widows, of the testator, by giving, for instance, his slaves to his wife for her life, and after her death to be free. If the construction of Chancellor WYTHE and Judge ROANE were correct, and they were free immediately; in that case, either the emancipation must be declared to be ineffectual, or the intent of the testator in favor of his wife, or of the slaves, or of both, must be frustrated by the operation of this law. For, if their right to freedom accrued upon the testator's death, then, within a twelve-month thereafter, they must leave the Commonwealth; in which case, the intent of the testator, in relation to his wife, would be defeated; or, if they departed not, then they would be sold for the benefit of the overseers of the poor, and the will of the testator be frustrated, both as to his wife and the slaves; or, if neither of these consequences followed, then such an emancipation, with an obligation to future service, would counteract the policy of this law

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1824. also. On the contrary, the construction, that such an
February. emancipation leaves the slaves in absolute slavery during
Maria, &c. the widow's life, and that their right to freedom accrues
v. only on the death of the widow, effectuates the intentions,
Surbaugh. both of the testator and the law, without producing any
 inconvenience.

Considering, therefore, that a slave emancipated *in futura*, continues in the mean time a slave to all intents and purposes, I am led to the conclusion, that her children, born in the mean time, are born slaves, and so continue, notwithstanding the right of the mother to freedom at a future time, in which they do not participate by the literal construction of the act of 1753, taken in connection with the terms of the preamble to the original law of 1662; by the spirit and policy of all the other Legislative acts which bear upon the question; by analogy to the civil law, and by the authority of Chancellor WYTHE, and all the Judges of the Court of Appeals, who sate in the case of *Pleasants and Pleasants*.

The only other ground upon which the children of *Mary* could claim to be free, is, that it may be supposed that the intention of the testator was to emancipate them also, and that this may be fairly gathered from the will. I have no doubt, but that, if the idea had occurred to him, that she would probably have children before she attained her age of 31, he would have expressly provided that they also should be free, which could have been effected by the addition of these words, "and her increase." His not having done so, satisfies me entirely, that he never thought of, or intended to make any provision for the children. And if so, it was a subject in relation to which he had no thought, or will, or intention, and is consequently to be disposed of according to the law of the land.

In considering this case, I have not been inattentive to the favor shewn by the common law to liberty. *Co. Lit.* 124, b. But, it is my duty to execute the law as I find

it, according to its spirit and policy. And I must say, with the civilians, in relation to this case, *Quod quidem perquam durum est, sed ita lex scripta est.*

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The children of *Mary* being ascertained to be slaves, it is unnecessary to the purpose of deciding this cause, to consider to whom they belong.

I think the judgment is right, and ought to be affirmed.

Judge CABELL, concurred.

Judge BROOKE. If the appellants, the children of *Mary*, are entitled to freedom, it cannot be by force of any thing in the will, under which she has obtained her liberty. It was highly probable, that she would have children before she attained the age of 31; yet, they are not noticed nor alluded to by the testator. He might have strong reasons for liberating her, when she should arrive at the age of thirty-one, which did not apply to her children, born before that period. It may have been unjust to his family to extend his bounty to them also. However that may be, it is enough, that by no reasonable construction of the will, they can be included in it, or derive any benefit under it. They must claim their freedom on the rule, that the children shall be bond or free, according to the condition of the mother;—a rule, probably adopted from the civil law, by the act of 1662, and repeated in several subsequent acts, down to 1753. As to her condition at the birth of the appellants, according to the will, she was a slave until she attained the age of 31. It only declares her to be free when she shall arrive at that age. If she had never attained that age, it would have been wholly inoperative as to her, and her children would have had no pretensions to freedom. The idea, that she was free from the death of the testator, and only held to service until she attained the age of 31, is wholly inconsistent with the obvious intention of the testator. It is inconsistent, also, with the provisions of the act of 1782, for the reasons sta-

1824. ted by the Judge who has preceded me. Their claim is to
February. *liberty*, and not to *property*. The rule *partus sequitur*
Maria, &c. *ventrem*, is a rule of *property*, not of *liberty*, applicable
v. to questions of property decided by this Court, and has no
Surbaugh. application to the question now to be decided. The rule,
that the children shall be bond or free, according to the
condition of the mother, is a rule of a different character,
and has received a different exposition.' It imports the
condition at the *time* of the birth, in exclusion of any fu-
ture right to liberty. It does not include a remote event,
which may never happen, nor any right of which the
mother is not in the enjoyment, at the time of the birth.
It has been so expounded by the writers on the law, from
which it was borrowed by our act, on grounds of policy
and humanity, equally applicable here. The case of *Plea-*
sants v. Pleasants, is not, to say the most of it, in hos-
tility with this construction.

The Court is unanimously of opinion to affirm the judg-
ment.

LOMAX v. PICOT.

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An appeal will lie from an order of the Chancellor over-ruling a motion to dissolve an injunction, where the motion has been over-ruled on the ground, that the plaintiff in equity is entitled to relief on the merits, and fixing the principle on which the cause depends, or where it is necessary to avoid expense and delay.

It is error in the Chancellor to grant an injunction, without requiring security, except in the case of executors, administrators, and other fiduciary characters. An endorsee, who purchases a negotiable note, without notice of any equity between the maker and endorser, is not affected by such equity; especially where, before the assignment, the maker gives assurances to the endorsee, that the note will be duly paid.

On an appeal from an order refusing to dissolve an injunction, the Court will take notice of any error in the previous proceedings.

This was an appeal from the Richmond Chancery Court. The whole case is so fully stated, and discussed, in the following opinions, that any other report would be unnecessary.

Lomax and *Stanard*, for the appellant.

Johnson and *Nicholas*, for the appellee.

February 7. The Judges delivered their opinions.*

Judge GREEN.

Picot having purchased a house and lot of *Adams's* executors, executed his negotiable notes for the purchase money to *Page*, the executor of *Byrd*, who knew the consideration for which the notes were given; it being for the purchase of property, to which *Page* had claimed a title, on behalf of his testator's estate, and he having released that claim for a stipulated sum to be paid by *Adams's* executors. The notes of *Picot* were given in part satisfaction thereof. These notes were assigned to *Lomax*, for a

* Judge CABELL, absent from indisposition.

1824. valuable consideration, upon the previous assurance of *Picot*, that they should be duly paid. *Lomax* had notice of
February. the consideration for which the notes were originally
Lomax given. *Picot* had executed to *Page* a deed of trust on
v. the property, for the purchase money of which the notes
Picot. had been given, for securing the payment of the notes. One of the notes being protested for non-payment, the trustees, at the instance of *Lomax*, were about to proceed to sell the property, according to the terms of the deed, when *Picot* exhibited his bill, charging the facts above stated, and that he had lately discovered that the title to the house and lot was fatally defective, and that one of *Adams's* executors had become insolvent, and the other is dead, and probably insolvent; and praying an injunction to the intended sale, which was awarded. This injunction being awarded, *without security*, and the cause coming on to be heard on the 20th of June, 1822, was ordered to stand over for the trial of another suit, between other parties, involving the title to the house and lot; and, upon the motion of *Lomax*, it was referred to a commissioner, to enquire whether the house and lot was sufficient security for the debt. *Lomax* having prosecuted suits at law upon two of the negociable notes, and recovered judgments thereon, *Picot* exhibited his bill, praying an injunction to the judgments, and setting forth, in substance, the same equity as that alledged in his former bill, and that the house and lot were ample security for the balance of the purchase money. Upon which, the Chancellor, on the 26th of April, 1823, awarded the injunction, upon conditions; 1st, "that the plaintiff enters into bond with security to the plaintiff at law, in a penalty equal to the double of that sum which commissioner *Baker* shall, after notice to the parties to this bill, ascertain to be the deficiency, if any, of the lot in question, to secure any balance of the purchase money now in question; and, 2d, that the plaintiff also release all errors, if any, in the judgments at law. When commissioner *Baker* shall have made his re-

port, in conformity with this order, to the Clerk's office of this Court, the Clerk will endorse the sum, if any, in which the plaintiff is to give bond and security in the law Court, or in the Clerk's office thereof, where also the release will be executed."

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The commissioner reported, that the house and lot were a sufficient security.

On the 4th of June, 1823, *Lomax* not having answered, moved to dissolve the injunction, unless bond and security should be given by the plaintiff, for the prosecution thereof, which motion was over-ruled. Whereupon, on the same day, *Lomax* filed his answer, insisting, that he was not affected by any equity which the plaintiff might have against *Adams* or *Page*. On the 9th of June, leave was given the plaintiff to amend his bill and make new parties; and, on the 17th of June, *Lomax* having answered, moved again to dissolve the injunction, on the merits, which the Court over-ruled, and "further continued the injunction, until the other answers come in," "and thereupon, the defendant *Lomax* prayed an appeal, for the purpose of settling the principles of the cause." The Court refused to allow the appeal prayed for, upon the ground, that the Judge had no authority for it. Thereupon, *Lomax* applied to one of the Judges of this Court for an appeal, in general terms, alledging, in his petition, that all the orders in the cause were erroneous; and an appeal was allowed from all the orders in the cause.

I have some doubts, whether, upon these proceedings, the appeal ought not to be considered as allowed regularly from the last order only. But, that is not material; for, if the appeal be confined to that, and, as to that, were properly awarded, and that order should be found to be erroneous, then all other errors, in the former proceedings, should be corrected, if erroneous; as in the case of an appeal from a final decree, not only any error in that, but any error in the former proceedings ought to be corrected.

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The first enquiry in this case is, whether the order of the 17th of June, 1820, over-ruling the motion to dissolve, and continuing the injunction until the other answers should come in, was such an order as might be appealed from. This depends on the just construction of the act of 1818, chap. 66, § 57, which provides in substance, that in any cause depending in any Superior Court of Chancery, where in any interlocutory *order* or decree hath been or shall be made, the Court or Judge in vacation, before a final decree, may grant an appeal from such interlocutory order or decree; provided, money is required to be paid, or property changed, "or the Court shall think such appeal proper, in order to settle the principles of the cause, or to avoid expense and delay." And if such appeal be refused, the Court of Appeals, or a Judge thereof, in vacation, may grant an appeal from such order or decree, for any error therein.

If this section stood alone, it would hardly be doubted, that an order refusing to dissolve an injunction and continuing it until the answers of other parties should come in, founded upon the avowed opinion of the Court, that the plaintiff would be entitled to full relief, in the event of those other parties, or any of them, claiming and establishing a title to the property in question, would be such an order, that, upon an appeal therefrom, the principle might properly and finally be settled, whether upon the facts of the case, the assertion and establishment of such title, would or would not entitle the plaintiff to relief; this being the only principle involved in the cause, and an important one; or that such an order, requiring that a multitude of other parties should be brought before the Court, for the purpose of litigating the title in question, and continuing the injunction until their answers came in, and in effect (if they claimed title, as they already had in another cause in the same Court,) until their rights were ascertained, would be such an order as, from which, if erroneous, an appeal ought to

be allowed, according to the letter and spirit of the statute, in order to avoid expense and delay. The delay must necessarily be great, and the defendant, from considerations of prudence, would encounter a great expense in supporting the title of the plaintiff, when, in the final event, it might turn out, that it was a matter of utter indifference to him, whether *Picot* or any of the other parties had the better title, so far as his interests were concerned.

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But, it is said, that whatever might be the just construction of this section, standing alone, yet, taking into view another section of the same act, and the history of our legislation in relation to appeals from interlocutory decrees and orders, and from orders dissolving injunctions, the order in question does not come within the meaning or policy of the 57th section of the act, and no appeal properly lay from it. Originally, the Court of Appeals had no jurisdiction, but upon appeals from *final* decrees and judgments. The construction given by the Court to the statute prescribing this rule, was so strict, that so long as any thing could be done in the cause in the Court below, even if it were only to superintend the carrying into effect the decree, which ascertained, conclusively, the rights of all the parties, as in the case of a decree of foreclosure and sale, no appeal could be allowed. Inconvenience was felt from this rule, and in 1798 it was enacted, "that it shall be lawful for the High Court of Chancery, upon any interlocutory decree, where the right claimed shall be affirmed or disaffirmed, to grant, in its discretion, an appeal to the Court of Appeals, if the High Court of Chancery shall be of opinion, that the granting of such appeal will contribute to expedition, the saving of expense, the furtherance of justice, or the convenience of the parties; any law, custom, usage, or construction, to the contrary, notwithstanding."

The practice, upon a liberal construction of this statute, seems to have grown into an inconvenience on the other hand; for, in 1807 it was enacted, that "no appeal shall



1824. hereafter be granted in any cause in Chancery, until a final
February. decree is pronounced, unless the Court in which such cause
is or may be depending, shall think it necessary to prevent
Lomax a change of property under an interlocutory decree, and
v. before a final decree can be pronounced." Neither of these
Piscot. acts authorised an appeal, but from an *interlocutory decree*,
which can only be made upon a hearing of the cause. They
did not extend to *orders* made in the progress of the cause,
on motion; nor after the act of 1807, to any case but where
the effect of the decree was, to produce a change of property.
The case of an order refusing to award an injunction,
or dissolving an injunction, was not provided for, except,
perhaps, in the latter case, when the decree dissolving the
injunction was pronounced upon a hearing, and the effect
of it was, to produce a change of property. Such a case
was not likely to occur often, and even in such a case, if
the Chancellor refused an appeal, the party had no remedy.
To remedy these defects in relation to the awarding and
dissolving injunctions, the act of 1810 was passed, author-
ising the Judges of the Court of Appeals, or any one of
them, to award an injunction when refused by the Chan-
cellor, or to allow an appeal from an order dissolving an
injunction, without any limitation as to this power, arising
out of the circumstances of the case. But, in neither of
these cases had the Chancellor a power to allow an appeal,
as in the case of interlocutory decrees changing property.
The case of an order, on motion, refusing to dissolve, and
continuing an injunction, was clearly not provided for by
any of these laws. In 1815, the provision incorporated in
our late revisal, before cited, was enacted. This act also
allowed, at the discretion of the Chancellor, appeals from
all interlocutory decrees of the County Court, without
limitation. The act of 1815 extended the right of appeal
to interlocutory *orders*, as well as *decrees*. It made, for
the first time, the circumstance, that the order or decree
required the payment of money, one criterion on which
the right of appeal depended. It adopted the act of 1807,

as to the circumstance of the decree producing a change of property, as another criterion, and extended it to orders, as well as decrees. It enlarged the operation of the act of 1798, by using the terms "to settle the principles of the cause, instead of the right claimed, affirmed or disaffirmed," if any case can occur in which it might be proper to allow an appeal "to settle the principles of the cause," where the decree had not affirmed or denied the right claimed. If there could, the Legislature intended to provide for it. This act adopted the provisions of that of 1798, in relation to expense and delay; and dropped that in relation to the convenience of the parties. The act of 1810, in relation to appeals from refusals to grant, and orders dissolving injunctions, was re-enacted in the revival of 1819, chap. 66, § 44.

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Upon this view of the statutes, it is insisted, that the statute of 1815 ought to receive the same construction as that of 1798, as to the character of the decree, and that the right claimed should appear to be affirmed or denied by the order or decree in question, to justify an appeal. If this were so, it would not affect the case at bar; for, the right claimed by the plaintiff is as strongly affirmed as it possibly can be, before a final decree. It is expressly asserted by the order, and in consequence of that recognition of the right to be exempted from the payment of the judgments in question, if his title to the property in question should prove to be bad, the Court has ordered, that all proper parties to discuss the title shall be brought before the Court in that cause. They are numerous, and this order must produce great expense and delay. It is further insisted, that the 57th section ought not to be construed to extend to an order refusing to dissolve and continuing an injunction; because, if it did, there would have been no necessity for re-enacting the 44th section, in relation to the refusals to award, and the dissolving of injunctions; and that section providing the law in relation to injunctions, must be considered as exempting them from the

1824. operation of the 57th section entirely. I cannot feel the
February. force of this reasoning. The 44th section does not pro-
vide at all for the case of an order refusing to dissolve,
and continuing an injunction. Such an order may come
within the terms of the 57th section, and the mischief intended to be provided for by that section. And, as there is no other declaration of the will of the Legislature as to such case, I do not see why it should be withdrawn from the operation of the general law. It might be said, truly, that in relation to the provision of the 44th section, as to refusals and dissolutions of injunctions, it ought to be considered as withdrawing those cases from the 57th section, if there be a difference between the effect of these two sections in such cases. And there is such a difference; for, a previous application to the Chancellor for an appeal, and his refusal, are not necessary in the cases provided for in the 44th section, in order to enable the party to apply to the Judges of the Court of Appeals as they are in the cases provided for in the 57th section. The motive for adopting this distinction, probably was, that the former class of cases were commonly more, and the latter less urgent; and the object of the Legislature, in providing thus in relation to the latter class, was, probably, to save the Court, in term time, from the consumption of time necessary to examine the records, upon such applications, unless the Chancellor had previously refused an appeal. And this is made the more probable, since the jurisdiction in the other class of cases is given, not to the Court, but to the Judges out of Court. Moreover, an order for dissolving an injunction may not come within the terms of the 57th section, and yet it might be important to provide for such case; as, for instance, an injunction to a nuisance, or to stay waste, an order dissolving which would neither require money to be paid, or property changed. Nor would an appeal be proper, to settle the principles of the cause, or to prevent expense and delay. There might be no principle involved in the case. It might turn upon a mere

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question of fact in issue between the parties; and it might appear, from the record, that the case would be finally heard, as a matter of course, at the next term of the Court of Chancery; so that an appeal would produce, instead of avoid, expense and delay. There was, therefore, good reason to retain the 44th section of the act, without supposing that it was intended to prohibit an appeal in cases of orders, refusing to dissolve, and continuing injunctions, which fell within the terms of the 57th section of the act. None of the reasons for the provisions of the 44th section, apply in any degree, to the last mentioned case.

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I think, therefore, the appeal was properly allowed, and that the merits of the case must be examined. I have investigated this question of jurisdiction the more largely, because this is the first instance in which the construction and effect of those statutes have been the subject of serious question in this Court. To the just decision of this case, upon its merits, a more careful examination of the facts of the case is necessary.

A piece of land in the city of Richmond was claimed by the executors of *Richard Adams*, as the property of their testator; by *William Byrd Page*, the executor of *Mary Byrd*, who was executrix of *William Byrd*, as the property of the said *William Byrd*; and by the Corporation of the city of Richmond, as a common. Suits were depending in the Richmond Chancery, in which all these parties respectively asserted their claims to the property; and the devisees of *Richard Adams*, some of whom were infants, were also parties to these suits. The parties compromised their respective claims; and the Court, with the assent of all the adult parties, and the guardians of the infant parties, decreed according to the compromise. By this compromise, the executors of *Adams* purchased the release of the claims of the Corporation of the city of Richmond to the property in question, at the price of \$100,000, payable in instalments; and from *William B. Page*, executor of *Mary Byrd*, who was executrix of *William*

1824. *Byrd*, a release of the claims of the representatives of
February. *William Byrd*, for the price of \$75,000, payable also in
 instalments. *William B. Page*, as executor as aforesaid,
 executed a release according to the contract; and the ex-
 cutors of *Adams*, with the adult devisees of *Richard*
Adams, executed their negotiable notes to the said *Page*,
 as executor as aforesaid, for the \$75,000, payable in in-
 stalments; and, as a further security for the payment of
 the notes, a deed of trust on the property which had been
 the subject of litigation and compromise.

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On the 8th of March, 1819, *Adams's* executors sold a house and lot (which was a part of the property which had been in controversy, and included in the deed of trust aforesaid, for the benefit of *Page*, executor, &c.) to *Giles Picot*, the plaintiff, at the price of \$13,000; of which, \$4,000 were paid down (probably to *Page*, by direction of *Adams's* executors, in part payment of the debt due from them to him,) and *Picot* executed to *Page*, at the instance of *Adams's* executors, his several negotiable notes for the residue of the purchase money, payable in instalments, with a deed of trust upon the property, to secure the payment of the notes. *Picot* asserts, (which is admitted by *Page*,) that *Page* stipulated, in consequence of that payment, and those assurances, to release the lien which *Adams* had given to him, so far as it affected the property sold to *Picot*. *Adams's* executors professed to sell to *Picot*, by virtue of an authority vested in them by the will of their testator; and their conveyance to him contains a warranty against all persons claiming under *Richard Adams*, and a covenant, that if evicted by any person having a better title than *Richard Adams*, he might have satisfaction out of *Richard Adams's* estate, as if *Richard Adams* himself had conveyed with general warranty. The answer of *Lomax* asserts, that, in consideration of the notes of *Picot*, *Page* released so much of the debt of *Adams's* executors and devisees to them; but, this fact is not proved, and cannot, therefore, be taken to exist. *Pi-*

ecot admits, that he had full knowledge of the foregoing facts, in relation to the title of the property he purchased, and believed the title to be good; and that *Page* and *Adams's* executors acted *bona fide*, in the belief that the title was good. Afterwards, in December, 1819, *Page* offered to endorse *Picot's* notes, without responsibility or recourse, to *Lomax*, in satisfaction of a debt of *William Byrd*, which was in the hands of *Lomax*, for collection. *Lomax* having examined the decree which confirmed the compromise, and otherwise acquired full information that the notes were given for the purchase of the property, the subject of that compromise, applied to *Picot*, to know whether the notes would be paid at maturity; and was assured by him that they would; and, thereupon, took an assignment of the notes, without recourse against *Page* or *Byrd's* estate, and an assignment of *Picot's* deed of trust. But, preliminary to closing the contract with *Page*, the latter also procured an agreement from the executors and adult devisees of *Adams*, that any person to whom *Page* should transfer *Picot's* notes, should be entitled to claim, under the securities originally given to *Page* by them, any deficiency which might arise by the default of *Picot*, in the payment of his notes; *Picot's* debt being first resorted to. *Picot* charges, that *Lomax* knew that his (*Picot's*) title to the property, was defective, and procured this engagement, as an indemnity against the defects; which *Lomax* positively denies, and affirms that he had no suspicion of any defect in *Picot's* title, and procured this engagement as a security against the possible inability of *Picot* to pay his debt, and insufficiency of the property pledged, to secure it. And the terms of the engagement verify this assertion; for, so far from the agreement sanctioning the idea, that the parties intended to provide for the event of *Picot's* debt not being due, it provides only for any deficiency arising from *Picot's* default; and, after his debt had been, in the first instance, resorted to, there is some mistake in the last sentence of the agreement, which is unin-

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telligible, taken in connection with the whole tenor of the agreement. After *Picot* had paid his first note to *Lomax*, and before the second became due, he received information which inclined him to think that he had not a clear title, either to the interest of *Richard Adams*, *William Byrd*, or the Corporation of the city of Richmond, in the property which he had purchased. Yet, after receiving that information, he wrote to *Lomax*, and, without hinting that he had received this information, or that he had any objection to the payment of the second note, asked some indulgence, referred to the lien on the house and lot, which he stated was good security for the debt; and offered, if the indulgence was given, to give any additional security in his power.

The objections thus discovered to the title were, 1. That the executors of *Adams* had no power to bind the devisees, not consenting, or of the infant devisees, by the compromise, or to purchase the claims of the City of Richmond and *Byrd*, at the expense of their testator's estate, and to bind his estate for the purchase money, or to sell the property. 2. That the Corporation of the city of Richmond had no right to sell their commons. They, however, insist upon the compromise; and if it should be set aside, to be remitted to their former rights. 3. That *Byrd's* representatives are dissatisfied with the compromise, and some of them are infants, (*Page* denies that they are dissatisfied,) and that *Page*, as executor of *Mary Byrd*, who was executrix of *William Byrd*, had, on various grounds, no authority to dispose of *Byrd's* rights in the subject. And, upon these grounds, several of *Adams's* devisees, infants at the time of the compromise, but now adults, have filed their bill for the purpose of setting aside the compromise, and every thing done in consequence of it, and to be restored to their original rights.

It is also alledged, that one of *Adams's* executors is insolvent, and the other dead, and his estate probably not sufficient to make good the purchase money to *Picot*, if

he should be evicted, and that *Page* is prosecuting a suit upon the deed of trust executed to him by *Adams's* executors, and claiming his lien under that deed, upon the property purchased by *Picot*.

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Upon this case, if *Adams's* executors were claiming the purchase money against *Picot*, upon any possible security given by him to them, the circumstances as to the alledged defects in the title, the fact of the prosecution of a suit for impeaching the title, by those claiming under *Richard Adams*, and the alledged insolvency of the executors, would, unquestionably, according to the decisions of this Court, justify a Court of Equity in restraining the payment of the purchase money, until the fate of the title were ascertained; and *Page* would be subject to the same equity, if, (as I think it must be taken to be on this record,) he took *Picot's* notes and deed of trust as a collateral security, and not as a satisfaction for so much of the debt due to him, from *Adams's* executors and devisees. What would have been the effect of his accepting it as a satisfaction of so much of that debt, need not be examined, as that fact does not appear. The real, and upon the merits, only question in the cause, is, whether *Lomax's* rights are affected by *Picot's* equity, as against the executors of *Adams* and *Page*.

It is admitted on all hands, that the policy of the law, in relation to negotiable securities, would exempt *Lomax* from any equity which *Picot* may have against the parties, if he be a *bona fide* holder of the notes, for full and valuable consideration, without notice of such equity, and took the assignments in a due course of trade. Was he such a holder?

The endorsement of a negotiable security, *prima facie* imports an assignment for full and valuable consideration. In general, the *onus probandi* lies upon him, who alleges the contrary. But, circumstances may exist, which may throw upon the endorsee, the obligation to prove the consideration given. But, that case cannot exist, until the

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question be put in issue, whether a full and valuable consideration was given, or not. The plaintiff has not alleged that such consideration was not given in this case, nor does he raise any question on that point. The legal presumption, then, ought to prevail, independent of *Lomax's* and *Page's* express averment of a full and valuable consideration paid by him, in the release of a debt of *William Byrd's*, and taking the endorsements, without recourse to *Page* or his testator's estate.

(The notes were assigned in the due course of trade. Every negotiable security, endorsed before it is payable, with intent to make it the absolute property of the endorsee, is endorsed in the due course of trade. Not so, if it be endorsed after it is dishonored, or for the use of the endorser, or as a collateral security.) An endorsement, without recourse, is not out of the due course of trade. The security continues negotiable, notwithstanding such an endorsement. Nor does such an endorsement indicate, in any case, that the parties to it are conscious of any defect in the security, or that the endorsee does not take it on the credit of the other party or parties to the note. On the contrary, he takes it solely on their credit, and the endorser only shews thereby, that he is unwilling to make himself responsible for the payment; and in the case at bar, the refusal of *Page* to make himself personally responsible for the payment on the day, in default of *Picot*, (he having received no personal consideration for the note, but only a release of his testator's debt,) could have excited in the endorsee no suspicion, that the security was liable to any objection, other than that it might turn out that the drawer was unable to pay, and that the security given by him might be insufficient. Nor did *Page's* refusal to make himself or his testator's estate responsible, in the event of the non-payment of the note by *Picot*, indicate that he ever apprehended such inability or insufficiency himself. For, as in the event of the non-payment of the notes, *Adams's* executors and devisees would be liable to

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Page upon their original obligations to him, he wished, in that event, that *Lomax* should stand in his shoes as against them, and proceed directly against them, instead of against him or his testator's estate; and to that end procured the stipulation from them, which accompanied his assignment of the notes to *Lomax*. It was merely substituting their ultimate responsibility to him, for his immediate responsibility to *Lomax*. Independent of this view of the object of that stipulation, the taking of a collateral security from others, does not take the endorsement out of the usual course of trade. However much the endorsee might have relied upon the credit of the drawer and the security given by him, and however confident he might have been, in the perfect validity of the obligation of the drawer, it was but a prudent precaution, and, I presume, not unusual, to procure, if he could, collateral security. *Lomax* is, therefore, a holder for full and valuable consideration, and has taken the notes in the due course of trade. It remains to enquire, whether he is, or is not, a *bona fide* holder, without notice of *Picot's* equity. It is not sufficient, in order to enable the drawer to assert his equity against the holder, that the latter purchased with notice of the consideration for which a note was given, unless he knew, at the same time, that it had failed, or would probably fail, or was affected by fraud; that is, unless he knew that there was then a subsisting equity, or at least, that an equity would probably arise out of the known facts, against the note.

In all cases in which a note is given for any other consideration than money actually paid, or for a subsisting debt upon an account current, or for accommodation, an equity between the parties may arise out of subsequent events; for, in all cases, other than those above-mentioned, the consideration may fail. To declare, then, that a mere knowledge of the consideration of a note, without any knowledge or suspicion of any defect or unfairness in the consideration, then subsisting, subjects the holder to all fu-

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ture contingencies which might produce a failure of the consideration, would be to destroy the credit and negotiability of such securities, and counteract the policy of the law, in giving such credit and negotiability to such securities. The principle, upon which a purchaser with notice of any existing equity is bound, is, that he acts *mala fide* in attempting, with a knowledge of such subsisting equity, to make the security his own, exempted from such equity, to the prejudice of another. The case of *Cumming v. Brown*, 9 East, 506, on a strictly analogous subject, cited at the bar, is a good commentary on this doctrine. A purchaser, without notice of any fact which, in fairness and justice, ought to prevent him from purchasing the security, is a *bona fide* holder, and exempted from any equity, as between other parties. If *Lomax*, therefore, had known that the note was given for the purchase of real estate, and had examined the title papers, and, upon the face of those title papers, no defect of title had appeared, and a defect had afterwards appeared *aliunde*, it could hardly be doubted that such a defect could not have affected his rights, acquired without any suspicion of such defect. It is not the duty of a purchaser of a negotiable security, which he knows to be given for the purchase of property, to enquire into the validity of the title. That is emphatically the duty of the purchaser, before he executes his note for the purchase money. But, in this case, *Lomax* did, in fact, examine the decree, and subsequent conveyances; and, upon the face of the decree, some of the objections now alledged against the title, probably appeared; although that cannot be confidently said, as a copy of that decree is not before us. He affirms, that this examination was made, with a view to ascertain whether the title to the lot pledged as a security for *Picot's* debt, was good, and that he believed it to be good; and his subsequent conduct proves that he acted under this impression. If then; actual notice of a defect in the consideration, were necessary to subject him to *Picot's* equity, he would be ex-

empted. But, a further question remains, whether, in legal construction, although he was not bound to examine the title, yet, having examined it, and the defect appearing on the title papers which he examined, he is not to be considered as having notice of the defect, and precluded from denying it. The circumstances of this case render it unnecessary to decide upon this question. For, *Picot* being the purchaser of the property in question, and the documents under which he claimed, disclosing the alleged defects of title, if *Lomax* was bound to take notice of them, *a fortiori* *Picot* was also bound; and, if *Lomax* must be considered as having notice of *Picot's* equity, *Picot* must be considered as having the same knowledge; and, with full notice of his equity, induced *Lomax* to take an assignment of the notes, and to part with full consideration for them, by his assurance to *Lomax*, upon *Lomax's* application to him upon the subject, that he would pay the notes when due, if the hardness of the times did not prevent him; and thus, relying upon the covenants in his deed, in effect waived his equity. But, the truth of the case is, that both parties were ignorant of those defects, and blameless in the transaction.

In relation to bills of exchange, Courts of Law proceed upon equitable principles. The endorsee has the legal title; and the principle, that where equity is equal, the law shall prevail, is as completely applicable at law to bills of exchange, as it is to other subjects in a Court of Equity. In neither Court, can any equity prevail against a purchaser for valuable consideration of the legal title, unless he be justly chargeable with *mala fides*. The supposition that *Picot*, if he paid the money, would be entitled to be substituted to the rights which *Lomax* would have against *Adams's* executors and devisees, for any part of *Picot's* debt not paid by him, could not justify the suspension of *Lomax's* remedies against *Picot*. Where a party has a double security and remedy, and another has an equitable right, if he discharges the demand, to be substituted to one

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of those remedies; if, in any case, the Court could compel the creditor to resort to that remedy, most beneficial to that other, it can only be, when such remedy is as effectual and beneficial to the creditor as that which he prefers. In this case, the one remedy is immediate; the other, if a possible remedy, is indefinitely remote. The question, whether *Picot* would be entitled, to the benefit of such substitute, is not before the Court. If he be, it is competent to the Court of Chancery to give him that relief. The injunction, therefore, ought to have been dissolved.

The question, as to the propriety of the terms of the original order for the injunction in this case, is not now in any way interesting to the parties in this cause. If further security should have been required, and the failure to require it has done any injury to *Lomax*, it cannot now be remedied; for, *Picot* has now no motive to give any additional security. Yet, as it is a question of great importance, and comes regularly under the consideration of the Court, it is proper to examine it.

The Court of Chancery had originally a discretion as to the terms upon which injunctions should be awarded. A sound discretion upon this subject required, that the Court should take care that the terms should be such as to ensure, with all practicable certainty, that the defendant should sustain no ultimate loss, in case the injunction should be dissolved. This discretion still remains, unless controlled by statute; and, if so controlled, in any respect, still remains, so far as it is not so restrained.

As long since as 1744, it was provided, that before any injunction should be granted to stay proceedings at law in any action, suit, or judgment whatsoever, the party praying the injunction should enter into bond, with security, in the Clerk's office, for satisfying all money, tobacco, and costs then due, or which might become due, to the plaintiff in the action, suit or judgment so to be staid; and all costs which might be awarded against such party, if the injunction should be dissolved. This provision, upon the change

in the organization of the Courts and revisals, was re-enacted with some modification in the phraseology, which do not affect the question under consideration, and now stands in our Code in these words: "Where any injunction shall be granted, the Clerk shall endorse upon the *subpœna*, that the effect thereof is to be suspended, until the party obtaining the same, shall give bond with sufficient security, in the office of the Court in which the *judgment* to be enjoined shall have been obtained. The party obtaining the injunction shall *then* enter into bond with sufficient security, and file the same in the Clerk's office of that Court in which the proceedings at law were had, for paying all money or tobacco, and *costs*, due or to become due to the plaintiff in the action at law, and also all such *costs and damages* as shall be awarded against him or her, in case the injunction shall be dissolved."

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As to cases coming within the provisions of this act, and emphatically in the case of injunctions to judgments at law, the statute is explicit and imperious, and takes from the Chancellor all discretion as to the security, as clearly as words could do, unless the statute had provided explicitly that he should have no such discretion. But, it is said, that exceptions have been allowed to the effect of those laws, upon the circumstances of the case; and that this could only be done upon the ground, that the original discretionary power of the Chancellor or the Court, as to the terms upon which injunctions should be allowed, was not taken away by the statutes, and that, for the same reasons which have excepted the cases alluded to from the operation of the statute, all cases should be excepted, in which the security required by the act would be superfluous. The cases alluded to, are those of executors and administrators; as to which, the Courts seem uniformly to have held, that they are not bound to give security under the act; not because such security can be dispensed with in all cases, but because, upon the just construction of the law, it does not extend to those cases, but only to cases in which

1824. the party prays an injunction in his own right. And, as
February. a proof of this proposition, it has been said, that as the
Lomax terms of the act require the party giving such bond, to
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the injunction shall be dissolved, an executor or administrator could not assert the rights of the estate which he represents, without incurring a personal responsibility, which would frequently deter such trustees from asserting such rights, *Shearman, admr., &c. v. Christian & al.* 1 Ran. Rep. 393, and the cases there cited; that, therefore, the act should be construed to require bond and security only from those already bound by the judgment at law; and that this construction was the more reasonable, since it could not prejudice the creditor, the executor or administrator having already given good security in general, for the due administration of the assets. Whether this reasoning justified the proposition it was intended to support, it is immaterial to enquire here. The case at bar does not fall within this reasoning. The party praying the injunction was personally bound by the judgment enjoined, and the security which he had already given for the debt, (if it could be considered as any security under the circumstances of the case,) was no security for the costs of the Court of Chancery and the damages, in case the injunction should be dissolved, if any should be awarded. Nor can any apparent equity in the plaintiff's case, take it out of the statute; for, it is always possible that the defendant may not be affected by such equity, and that the injunction may be dissolved. When no equity is asserted against the judgment at law, the statute does not apply to the case; and the cases supposed at the bar, in which the statutory security would not be required, are cases in which some right would be asserted, not against, but collateral to the judgment.

But, even if the statute did not, in any case, restrain the original discretion of the Chancellor, in respect to the terms upon which injunctions should be granted, that dis-

cretion was improvidently exercised in this case. The plaintiff alledged in his bill, that the title to the property which he had pledged as a security for the debt, was seriously impeached, and that was the ground of the injunction. It was possible, that the defendant might still be entitled to claim the debt, although the title to the property was utterly worthless; in which event, the creditor would be left entirely without security, and might lose his debt in consequence of the interposition of the Court. And, even if the title proved to be good, he would be without security for the costs, both at law and in equity, and the damages allowed by law, upon dissolving injunctions, if they should be awarded. The strong opinion of the Chancellor in favor of the justice of the plaintiff's claim to relief, did not make this course the less improvident. For, it was still possible, that the defendant had the better equity.

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The order refusing to dissolve the injunction, should be reversed, the injunction dissolved, and the cause remanded to be further proceeded in.

Judge COALTER.

The first question which presents itself is, whether this appeal has been improvidently granted or not?

It is contended, that as well the order in vacation awarding the injunction, without requiring security, and the refusal in Court to discharge it unless security was given, as the refusal to dissolve after the answer was filed, were decisions on the merits of the case, against the appellant; that those decisions are erroneous; and that the latter particularly, comes within the provisions of the 57th section of the act concerning Courts of Chancery, and, consequently, an appeal lies therefrom. By that section it is provided, that the Court of Chancery, or the Judge in vacation, may grant an appeal from any interlocutory order or decree, where money is required to be paid, or

1824. the possession or title to property to be changed, or that
February. the Court shall think such appeal proper, in order to settle
 the principles of the cause, or to avoid expense and delay.

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The first enquiry then, is, whether these decisions, or either of them, were adjudications on the principles of the cause; and the second is, whether those proceedings, or either of them, are such orders or decrees as come within the purview of the act of Assembly, so as to make an appeal proper, in order to settle those principles.

As to the award of the injunction without requiring security, it appears to me that that must have proceeded on these assumptions: 1st. That the title of the land might prove defective, and although, if it did, it would be no security for the debt; yet, 2ndly. That the defendant could not possibly shew any thing in defence, which would entitle him to a dissolution of the injunction, should that title ultimately prove defective. In other words, that notwithstanding the negotiability of the paper, or any direct waiver of equity which might have taken place, the appellant could not be entitled to the money, provided the title to the lot proved defective. The bill alledges this defect, or probable defect of title, as the only ground for equitable interference, and consequently, that the house and lot were no security for the debt, in case the appellant should be entitled to recover it, notwithstanding such defect.

That injunctions may be awarded without security, in cases not coming within the intention of the law, as in cases of executors, administrators, or other fiduciary characters, when they are not personally responsible, or in some other cases mentioned at the bar, there never has been any doubt; but, whether this can be done in consequence of peculiar circumstances, in cases coming within the act, according to the sound discretion of the Chancellor, and on what terms, I think it most proper not to decide, as such decision would be *ex parte*, no such case being alledged in the present bill. As to this case, I think the award of the

injunction, and the refusal to discharge it for want of security, were irregular, and, in one aspect, amount to a decision upon the merits, against the appellant, before the filing of the answer.

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As to the second point, viz: the refusal to dissolve the injunction after the answer was filed; it seems to me, that as that answer mainly relies on a defence not at all affected by the question of good or bad title, it may be likened to the case of an assigned bond, where the obligor asserts an equity against the obligee, which, he alledges, affects the assignee, and against which the latter defends himself on grounds not connected with the equity asserted against the obligee, and insists that he is not bound to await the expense and delay, attending the litigation with the obligee. If this is the nature of the defence, and that defence is made good, it would surely be against equity, to withhold the debt from the assignee, until this dispute with the obligee, by which, be it settled as it may, he cannot be affected, shall be decided. Suppose the Chancellor, however, thinks the defence is not made out, and refuses to dissolve; yet, surely, if he thinks the case one of doubt, and in which he may be mistaken, it would not be improper in him to grant an appeal, in order to have the principles settled, as well for the sake of justice, as to avoid expense and delay to the party, provided such refusal is an *order* or *decree* within the purview of the statute. He will doubtless refuse, when he thinks the decision is clearly correct; but, should a Judge of this Court think differently, he would have the same right to grant the appeal as the Chancellor had.

The main defence in this case, is one of this kind. The Chancellor has decided against it, and would have allowed an appeal, but he thinks the refusal to dissolve is not an *order* or *decree* within the meaning of the act.

There was no application to him for an appeal from the refusal to discharge the injunction, unless security was given. As to this latter, it might, on this ground perhaps,

1824. if no other, be doubted whether it would be competent for
February. a Judge of this Court to grant an appeal from it, even if
 Lomax an appeal lay, there being no refusal of the Chancellor to
 v. grant such appeal therefrom, other than considering it as a
 Picot. part of the case in which, and from the subsequent order
 in which, the appeal was prayed.

Having doubts, however, on grounds independent of this, whether an appeal would lie from the refusal to discharge the injunction for want of security, and having done every thing which can *at present* be of consequence to the party, or useful to the public, by the opinion above expressed as to those proceedings, I think it best to decline any opinion on that point, and shall confine my decision to the question, whether the appeal was properly granted, from the order refusing to dissolve the injunction, after the filing of the answer.

I think this order disaffirms the main defence relied on; and that if such disaffirmance is incorrect, and if the correction of it by this Court must be suspended until the incalculable expense and delay of the suits, now pending, to settle the title to this property, are incurred, a case of hardship more clearly within the reason of the law, can hardly be imagined. If the decision, then, brings the party within the reason of the law, the words, I think, are broad enough to extend the remedy to him, and, consequently, this is an *order* or *decree*, from which an appeal lies.

The next question is, whether the decree is correct?

Whatever may be the equity of the appellee against *Adams*, or against *Page*, or whether there is such equity or not, I do not consider it important at present to enquire, inasmuch as I think the appellant stands on higher ground than either. He must be taken as the *bona fide* endorsee of the notes in question, for full value, unless, indeed, notice of the failure, or probable failure, of the consideration of the notes, can be brought home to him, so as to destroy that *bona fide* character of the transaction, on which he

relies, and the impeachment of which is the only ground of equity relied on in the bill. The bill itself admits, that a previous communication took place between the appellant and appellee, before the endorsement, and that no express notice was given by the latter to the former, of any *possible*, much less *probable*, failure of the consideration; for, in truth, that none such had ever been thought of, and that, consequently, a promise of payment was made.

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If the appellee knew at that time, that the title might prove defective, and, notwithstanding gave the promise, it would be a waiver of his equity, as that promise induced the purchase of the notes; and this, I presume, even if he had told *Lomax* of the state of the title, and his knowledge of its defects, so as to give him the same information that he possessed himself, but agreed to take that risque on himself, and to pay at all events. This would be to extend a credit to the drawer, as in case of a note for accommodation.

But, it is alledged, that the appellee was ignorant of any defect in the title; but, that the appellant knew of the defect, and, concealing that knowledge, procured a promise to pay the purchase money; by this means, seeking to bind him to pay for the lot at all events, although he knew the title might prove defective. This charge is denied in the answer; and the proof of it, is the admission, that the appellant had precisely the same knowledge of the title, and the same belief of its goodness, that the appellee had. Both knew the nature of the title; but, it is insisted, that the appellant was bound to know the law, and that the title might be disputed; and, therefore, the *bona fides* of the transaction is destroyed, and the *mala fides* proved. On the contrary, I think that the appellee, who was the purchaser of the land, was more bound to know the law, and its bearing on his title, than the appellant. He ought to have looked to this; and, it is more reasonable to presume that he did know the law, as it regarded his own

1824. title, before he induced the appellant to purchase the notes,
February. than to say, that after such promise, the appellant must
take the notes at his risque. To charge the appellant, it
Lomax ought to appear that he *in fact* had a knowledge of a de-
v. fect in the title, which the appellee had not; and that, not-
Picot. withstanding this, he had procured the promise under a
concealment of his knowledge of the title. Nothing of
this kind is pretended.

Both parties, in fact, are equally innocent, or equally
guilty; or, if there is any difference, it is against the pur-
chaser, who, with a knowledge of the nature of his title,
induced the appellant to lay out his money in the notes.
This being the case, the appellant, who has the law on his
side, must prevail.

I think, therefore, that the injunction ought to be dis-
solved, and must now be dissolved.

Judge BROOKE.

The injunction in this case was granted on terms, to be
ascertained by a commissioner, and on whose report the
Clerk, and not the Chancellor, was to judge of the suffi-
ciency of the security, without affording to the appellant
an opportunity to object to that report, and to shew that
the security was insufficient. This course was certainly
not within any of the exceptions stated by the bar, nor
consistent with the provisions of the 113th and 114th sec-
tions of the act concerning Superior Courts of Chancery.
1 *Rev. Code*, p. 218. It was further in violation of that
act, because, in effect, no security was given, inasmuch as
an alledged defect in the title to the lot conveyed by the
deed of trust was the ground of the application for the in-
junction, which, if true, deprived the appellant of the se-
curity required by the act; and, if untrue, removed the
foundation of the interposition of the Court of Chancery.
There being nothing in the act authorising an appeal from
those proceedings, the appellant moved the Court of Chan-

cery to dissolve the injunction, unless sufficient security was given. No appeal was taken from the refusal of the Chancellor to dissolve the injunction; and it is not necessary to decide, under what circumstances, if under any, an appeal would lie, in such case. At a subsequent period another motion was made by the appellant, to dissolve the injunction, on the merits; which, being again refused by the Chancellor, an appeal was allowed by one of the Judges of this Court, in vacation. If that appeal is sanctioned by the act aforesaid, the appellant will be let in to object to the terms on which the injunction was granted, and to the refusal of the Chancellor to dissolve it, although the security required by the act was not taken. Whether the appeal was providently allowed by the Judge of this Court, will depend on a correct construction of the 57th section of the act before referred to. By that section, an appeal is allowed from any interlocutory *order* or *decree*, by which money is required to be paid, or the title or possession of property is to be changed, or the Court shall think such appeal proper to settle the principles of the cause, or to avoid expense or delay. By the interlocutory order, refusing to dissolve the injunction, on the merits, I think the principles of the cause were so far settled, as to come within one of the provisions of the section. It was also calculated to produce the expense and delay intended to be avoided by the act. The refusal to dissolve the injunction, is, in substance, stated to be, because, by the facts in the case, the appellant had placed himself in the shoes of the vendors of the lot in question, and was subject to all the equity that would affect them, until the title was cleared up by decrees to be made in the suits referred to in the order then pending in the Court of Chancery, in which the appellant was no party, and as to which new parties were to be made, involving great delay and expense. Whether the appellant was to be affected by this undecided equity against the vendors, was the real point in controversy between him and the appellee. As to his rights, the principles of the cause were

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decided by the order to dissolve the injunction; and, whether by a direct order to that effect, or by consequence from the grounds taken by the Chancellor, was not material. It was substantially an interlocutory order, within the meaning of the section, and justified an appeal from it. That appeal brings up the whole proceedings in the case. The irregularities before stated in granting the injunction, and refusing to dissolve it on the first motion, are all properly before this Court, and liable to the objections before stated.

In the view that I have taken of the merits, it is not necessary to investigate the supposed equity against the vendors of the property. Whether *Page* was authorised by the will of *Byrd* to make the compromise, or whether the executors of *Adams* had authority to sell the property to the appellee, are matters not decided by the Chancellor, and depend on an investigation to be made in the causes referred to, the proceedings in which are not before the Court. The only question is, whether the appellant is to be affected by any equity against those parties, if any exists. If he is not to protect himself by their rights, it is not necessary to examine them as against the appellee, even if the causes involving that enquiry were before the Court. Before the appellant received the notes of *Page*, in discharge of the debt due by *Byrd's* estate, it is not pretended that he had the slightest interest in this enquiry. His claim upon *Page*, as executor of *Byrd*, grew out of a totally distinct transaction. Holding the claim against *Page*, he might enforce it, if *Page* did not pay it, without regard to these enquiries. It does not appear that he had any interest in receiving the notes of the appellee, in preference to any other mode of payment that might have been resorted to by *Page*. The notes were offered in payment; yet the appellant would not receive them, until he was assured by the appellee that they would be paid when they fell due, if not prevented by the hardness of the times. The proposal by *Page*, as executor of *Byrd*,

to endorse the notes without recourse, and to assign the deed of trust, was not calculated to give the appellant any alarm, as to the nature of the consideration on which the notes were given. As executor, *Page* was not bound to make himself personally responsible for the debt, nor to the hazard of a protest in the bank, in the event that they were not punctually paid. It was proper, also, to protect the assets of his testator, by assigning the deed of trust. The taking collateral security by the appellant, was also a reasonable caution against the insolvency of the appellee, though no reasonable suspicion of his liability to pay existed. If, however, these circumstances put the appellant upon an enquiry into the consideration for which the notes were given, he made the enquiry, and was assured that they would be paid. The appellee possessed as much information as to the nature of his title, when he gave the assurance, as the appellant, and ought to have possessed more. Perhaps he relied on the covenants in his deed, the validity of which concerned him, and not the appellant. If the latter is not to be protected by the principles that govern the negotiability of the notes, he might rely on superior equity, at least on equal equity, and protect himself by his judgments at law. But no bad faith is imputed to him. He received the notes in discharge of a *bona fide* debt, paid valuable consideration for them, and is entitled to the full benefit of their negotiability. In every point of view, I think that the injunction ought to have been dissolved by the Chancellor, on the merits.

The decree is, therefore, reversed, the injunction dissolved, and the cause remanded.

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Persons born in a foreign country, of parents also born in foreign countries, are not citizens of Virginia, and, consequently, cannot inherit lands there; although their grandmother was a native of Virginia, who removed to England before the Revolution, married there, and resided in that country until after the peace, when she returned and resided in Virginia until her death.

This was an appeal from the Superior Court of Law for James City county. The case was twice argued in this Court, and held for some time under consideration, when the Judges delivered the following opinions. These opinions are so full an examination of all the points in controversy, that a report of the arguments of counsel (which were also very elaborate,) would be quite unnecessary.

Stanard, for the appellants.

Leigh and Tucker, for the appellees.

February 12. The Judges delivered their opinions.*

Judge GREEN.

This was an action of ejectment upon the demise of *John L. and P. J. Barziza* against *John Hopkins* and *William Hodgson*, and *Portia*, his wife. Upon the trial, the defendants demurred to the evidence. From this demurrer, the case appears, in substance, to be as follows:

The lessors of the plaintiff claim the land in question, as the heirs at law of *Lucy Paradise*, who was entitled to it under the will of her father, *Philip Ludwell*, who died in 1767. She was born in *Virginia*; and, in 1769, intermarried with *John Paradise*, in England, a native of that country, where she resided with her husband until 1788,

* Judge BROOKE, did not sit in this cause.

when they removed to Virginia, but, shortly after, returned to England. *John Paradise* died in England, in December, 1795. His widow afterwards came and resided in Virginia, where she died intestate, on the 24th of April, 1814. Upon her death, *Hopkins* and *Hodgson*, in right of their wives, who were nieces of Mrs. *Paradise*, entered into the land, claiming that their wives were her heirs at law. Mrs. *Paradise* had two daughters born in England, one of whom died an infant. The other, *Lucy*, on the 4th of April, 1787, intermarried in England, with *Barziza*, a Venetian nobleman. Mrs. *Barziza* died in Italy in 1800, and her husband died in Italy on the 13th of September, 1807. Neither Count *Barziza* nor his wife was ever in the United States. They had two children, the lessors of the plaintiff, *John L.*, born in Venice, February 20th, 1789, and *Philip J.*, born in Venice, August 10th, 1796. Upon this demurrer, judgment was given for the defendants.

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The question, whether these grand-children of Mrs. *Paradise* can succeed to her inheritance, as her heirs at law, depends upon the question, whether they were citizens of Virginia, at the time of the death of Mrs. *Paradise*. For, no one who is not a citizen, can, by the laws of Virginia, inherit lands here; and, all who are citizens can take by inheritance. The lessors of the plaintiff, being born in a foreign country, of parents also born in foreign countries, cannot claim to be citizens, unless that character is conferred upon them by the statutes of Virginia, or by the constitution and laws of the United States. To ascertain the effect of the statutes upon this subject, it will be necessary to take an historical review of all the statutes passed upon the subject; because, every statute (after the first,) passed in Virginia, although differing in some of their provisions from the former statutes, yet reserved all rights of citizenship acquired under former laws, and left such rights unaffected by the subsequent statutes.

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The first act passed upon this subject, was that of May, 1779. But, before we examine the effect of that and the subsequent acts upon the subject under consideration, it is necessary to ascertain what was the situation of Mrs. *Paradise*, before the act of 1779, in respect to her title to the rights of citizenship in Virginia.

She was born in Virginia, long before the Revolution, when Virginia was subject to the Crown of England. She removed to England many years before the Revolution, and there intermarried with a native of England; and, with her husband, permanently resided there from the time of her marriage, in 1769, until 1788, when she and her husband resided temporarily in Virginia; and, in 1789, returned to England, where she resided until after her husband's death in 1795; and how long after, does not appear.

If there were no Legislative declaration on the subject, it might be questionable, whether the fact of her birth in Virginia, notwithstanding her residence as aforesaid in England, would give her a character of a citizen of Virginia, after the Revolution; or, whether her residence in England gave her the character of a subject of Great Britain, and denied to her the character of a citizen of Virginia. The place of birth, it is true, in general, determines the allegiance. But, in this case, there was no independent government of Virginia, to which she could owe allegiance at the time of her birth. Yet, it may be said, that her allegiance was due to the actual government of the country of her birth; and, that when the sovereignty of that country was changed by revolution or otherwise, her allegiance still continued to be due to the existing government thereof, for the time being. On the other hand, when the people of Virginia renounced the government of Great Britain and declared themselves independent, it would seem that all persons then actually and permanently domiciliated in Virginia, even although hostile to the Revolution, were members of the community, and must be

considered as citizens, bound and protected by her laws, and owing allegiance to her government, unless they elected to adhere to their former allegiance, within a reasonable time; and that, from necessity, and from the principles of all government, whilst those who were then permanently domiciliated in Great Britain, whether born there or in Virginia, not being members of the Virginia community, nor bound by the laws, nor capable of the protection of Virginia, could not, therefore, be considered as her citizens, unless they elected within a reasonable time to adhere to Virginia. This reasonable and only convenient rule was adopted by the Legislature of Virginia, as will be seen hereafter; and I think that Mrs. *Paradise* was not a citizen, unless declared so by a Legislative act.

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At the May session of 1779, an act passed for escheating the real, and forfeiting the personal property in Virginia, of all British subjects; the third section whereof is in these words: "And for preventing doubts who shall be deemed British subjects, within the meaning of this act, it is hereby declared and enacted, that, (first) subjects of his Britannic majesty, who, on the 19th day of April, in the year 1775, when hostilities were commenced at Lexington between the United States of America and the other parts of the British empire, were resident, or followed their vocations in any part of the world, other than the said United States, and have not since either entered the public employment of the said States, or joined the same, and by overt acts adhered to them; and, (secondly,) &c.; shall be deemed British subjects, within the intention of this act." This act expressly declares, that the property of British subjects shall be deemed to be vested in the Commonwealth, the real by way of escheat, the personal by forfeiture; and directs proceedings to be instituted by way of inquisition, for escheating and forfeiting the same. There is no exception in favor of any person coming within the description of the act, neither of *femes covert*s nor infants.

1824. At the October session, 1779, this act was amended by
February. an act, the fifth section of which is as follows: "that all *femes*
Barziza *coverts*, widows and infants, natives of this State, now,
v. or lately resident in Great Britain, or other parts beyond
Hopkins, the seas, all widows, natives of this State, or widows of
etc. natives of this State, or infants, the issue of natives of this
 State, and all other persons, either natives of this State, or
 who were actually married to natives of this State, and
bona fide inhabitants thereof, at least one year at any time
 within four years, next before the commencement of hos-
 tilities on the 19th of April, 1775, or who left North Ame-
 rica at any time before the passing of the act declaring
 what shall be treason, (October, 1776,) and have not been
 guilty of any overt act injurious to the rights or liberties
 of America; and, also, all persons who left this State in
 their non-age, and have, during their absence, arrived to
 full age, within four years last past; and, also, the barons
 of *femes coverts*, natives of this State as aforesaid, as far as
 relates to any property which they held in right of such
femes coverts, shall, and they are hereby declared to be
 excepted out of the said recited act; provided, they have
 already returned, or shall return to this Commonwealth
 and become citizens thereof within two years, to be com-
 puted in the case of infants, from the time they arrive to
 the age of 21 years, and in all other cases, from the end
 of this present session of Assembly." Mrs. *Paradise* and
 her daughter fall within the description of British subjects
 in the act of May, 1779, and neither of them ever came
 within the exceptions of the act of October, 1779. If
 there were any doubt of the import of the words in the act
 of May, 1779, "subjects of his Britannic Majesty," and
 whether they embraced natives of Virginia residing in
 England on the 19th of April, 1775, the act of October,
 1779, is a complete Legislative exposition of that of May,
 1779, and shews that persons of that description were em-
 braced by the latter; for, otherwise, there would have been
 no necessity for excepting them by the act of October,

1779, upon the condition only of their returning and becoming citizens within a limited time. The Legislature declaring, by the act of May, 1779, that the real property of British subjects had escheated to the Commonwealth, in effect declared, that they, (to wit: all coming within the description of that act,) were aliens. Whatever, therefore, might be thought of a claim to citizenship in behalf of Mrs. *Paradise*, by reason of her birth in Virginia, in the absence of all Legislative provision upon the subject, it cannot be doubted that it was perfectly competent to the Legislature to prescribe any rule which they thought proper, for ascertaining who should be deemed to be aliens, and who citizens.

The two acts above referred to, decisively ascertain, who shall be considered as British subjects, and therefore aliens, and embrace the case of Mrs. *Paradise*, unless another act, passed at the session of May, 1779, should be supposed to except cases such as her's. This act passed subsequent in point of time to that of May, 1779, before recited. But, as the law then was, they were to be considered as cotemporaneous, and both taking effect from the first day of the session, and are, therefore, to be considered as one act. That act is entitled, "an act declaring who shall be deemed citizens of this Commonwealth," and provides, "that all white persons born within the territory of this Commonwealth; and all who have resided therein two years next before the passing of this act; and all who shall hereafter migrate into the same, other than alien enemies, and shall, &c., and, all infants, wheresoever born, whose father, if living, or otherwise, whose mother was a citizen at the time of their birth; or who migrate hither, their father, if living, or otherwise their mother, becoming a citizen; or who migrate hither without father or mother; shall be deemed citizens of this Commonwealth, until they relinquish, &c.; and all others, not being citizens of any of the United States of America, shall be deemed aliens." These two acts seemingly conflict with each other, when

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1824. the expressions of each are taken in their natural and most
February. extensive sense; and, if the Legislature had not expounded
Barziza them, there might have been great difficulty in ascertain-
v. ing, in order to reconcile them, and give them both effect,
Hopkins, whether the last act excepted from the generality of the
etc. description of British subjects in the first act, natives of
 Virginia residing in Great Britain; or, whether the first
 act excepted from the generality of the description of citi-
 zens of Virginia, all such as were residing elsewhere than
 in the United States. In either case, both acts would have
 ample subjects for their operation. We are, however, re-
 lieved from this difficulty, by the act of October, 1779,
 which, by Legislative authority, gives to the acts of May,
 1779, the latter construction. I conclude, therefore, that
 Mrs. *Paradise* was not, at the time of the birth of Mrs.
Barziza, and from that time up to May, 1779, a citizen
 of Virginia. But, if she were, the act of May, 1779, did
 not confer on Mrs. *Barziza* the character of citizen, even
 if it did confer that character upon her mother; for, her
 father was living at the time of the passing of the act, and
 never was a citizen; and the act did not confer upon the
 "infant" the character of citizen, by reason of the citizen-
 ship of the mother, at the time of the birth of the infant,
 if the father was living at the passing of the act. The
 word "otherwise," when it first occurs in the act, can
 have no other meaning, than that the condition of the mo-
 ther should not affect the condition of the infant, if the father
 was living. For, the same word occurs a second time in
 the act, and with the same context, where it can mean no-
 thing, but that the child, if the father be dead at the time
 of emigration, may be a citizen, if the mother becomes a
 citizen; but, not so, if the father be living. The act re-
 ferred to the condition of the father, if alive, and if dead,
 then, and then only, to that of the mother, for determin-
 ing the condition of the infant child.

In October, 1783, another act passed, entitled, "an act
 for the admission of emigrants, and declaring the rights to

citizenship;" which provides, "that all free persons born within the territory of this Commonwealth; all persons, not being natives, who have obtained a right of citizenship under the act of May, 1779, aforesaid; and also all children, wheresoever born, whose fathers or mothers *are* or *were* citizens at the time of the birth of such children, shall be deemed citizens of this Commonwealth, until they shall relinquish that character, in the manner herein-after mentioned;" and repeals the act of May, 1779, entitled, "an act declaring who shall be deemed citizens of this Commonwealth."

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In October, 1786, an act was passed to the effect (as to this subject,) of the act of 1783, *verbatim*, repealing expressly the act of 1779, and all acts coming within the meaning of that act, and, consequently, the act of 1783.

In 1792, the same act was re-enacted *verbatim*, except that it saved all rights of citizenship obtained "under former laws," instead of confining that saving to rights obtained under the act of 1779; and repealing all laws coming within the purview of that act. And so our statute law upon this subject remains to this time. All these acts contain various provisions for enabling aliens to acquire the character of citizens, and for enabling citizens to expatriate themselves. The act of 1783, (if Mrs. *Paradise* was not a citizen before, either by her birth, or by virtue of the act of 1779,) may have conferred that character upon her; and, if it did, the next enquiry would be, whether the act of 1786 conferred upon Mrs. *Barziza*, the same character. These acts, which are in the same words, are susceptible of only two constructions; either, that they were wholly retrospective, and embraced only children already born; or, both retrospective and prospective, embracing children born and to be born. If retrospective only, then the word "*are*" must be considered as meaning the same as "*are now*," and apply to fathers or mothers *then living* only; and the word "*were*" would apply only to the case of children born of fathers or mothers *then dead*. To

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give the clause this effect, it would be necessary to trans-
pose some words, and interpolate others, so as to read thus:
“whose fathers or mothers, if living, now are citizens, or
if dead, were, at the time of the birth of their children,
citizens, &c.” This transposition would, I think, be vio-
lent; and, I cannot suppose that the Legislature ever con-
templated to sanction the consequences of such a construc-
tion. The effect would be, that, if a naturalized citizen
brought with him to this country, a family of infant chil-
dren born abroad, before his naturalization, and died before
the passing of the act, they would be aliens, though if the
parent was alive when the act passed, they would be citi-
zens. If a naturalized citizen, alive when the act passed,
had adult children born abroad before his naturalization,
and residing, and continuing to reside in their native coun-
try for life, they would be *ipso facto* citizens by virtue of
the act. If a native or naturalized citizen had children
born abroad after the act, they would be aliens. The
other construction seems to me to be more conformable to
the probable views of the Legislature, and does no vio-
lence to the context and order of the sentence; and only
renders it necessary, in order to make the sense of the
sentence clear and intelligible, that the words which are
necessarily understood, shall be repeated in their proper
place, so as to read thus; “whose fathers or mothers are
citizens at the time of the birth of such children, or were
citizens at the time of the birth of such children, &c.”
The word “are,” thus used, would necessarily have a fu-
ture meaning, and import the same as “may be,” “shall
be.” This construction would afford an uniform rule, ap-
plicable to all future, as well as past, cases, and a rule which
would most naturally suggest itself to those who were
about to extend the rule of naturalization, beyond the
limits of the common law; to wit: that the child should
follow the condition of its parents, at the time of its birth.
But, to adopt the first construction, would not avail the
lessors of the plaintiff; for, although, if the act of 1783

gave citizenship to Mrs. *Paradise*, if she was not before a citizen; and, upon the construction aforesaid, the act of 1786 would, in that case, give citizenship to Mrs. *Barziza*, and the act of 1792 might, if not contrary to the act of Congress of 1790, have given citizenship to her eldest son, born in 1789; yet, the act of Congress of March, 1790, prevented the act of Virginia of 1792, from having that effect. That act of Congress provides, that "the children of citizens of the United States that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens; provided, that the right of citizenship shall not descend to persons, whose fathers have never been resident in the United States;" and all the subsequent laws of Congress on this subject, have the same provision. Virginia had no power to pass any law, counteracting the effect of this act. Although Virginia may authorise aliens to inherit lands in Virginia, she has not done so. She has left the right of inheritance as an incident to the right of citizenship; and, if she attempts to confer citizenship upon foreigners, in a manner prohibited by the constitution and laws of the United States, such attempt cannot enure to another purpose, and give a right to inherit, independent of citizenship.

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I think that Mrs. *Barziza* never was a citizen, her mother not being a citizen at the time of her birth; that her children born abroad cannot be citizens, and of course, have no title to the land in question. Neither can they claim under the treaty of London. It has been decided upon this very title, in the case of *Orr v. Hodgson & Hopkins*, in the Supreme Court of the United States, that the case of these parties, (they not being British subjects,) was not provided for by that treaty. I observe, that in that case, the Court, without discussion, considered Mrs. *Paradise* as an alien.

The judgment is right, and ought to be affirmed.

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Philip Ludwell resided in Virginia many years before the Revolutionary war, and possessed large estates there, and it is probable, though it does not appear from the evidence in the cause, that his daughter *Lucy*, afterwards *Lucy Paradise*, was born there. He removed to, and resided in *London* previous to the year 1767, in which year he made his will, and soon after died. *Lucy*, his daughter, in 1769, her father being then dead, intermarried with *John Paradise*, only son of *Peter Paradise*, of the county of *Middlesex*, in England, where she continued to reside with him until after the war. They had a daughter, who, it is admitted, was born about the year 1771 or 1772; at any rate, before the Declaration of Independence. This daughter was married about the year 1787, to Count *Barziza*, a Venetian, and resided with him from that time until her death, in Venice, where she had several sons, who are lessors of the plaintiff.

I am of opinion, that although Mrs. *Paradise* may have been born in Virginia, yet, on the Declaration of Independence she was no more a citizen, participating in that declaration and forming a part of the new empire, than any other citizen of London. Had she *there* adhered to the Royal cause, she was not guilty of treason against the State; whilst, on the contrary, had she *there*, by overt act, adhered to the cause of the revolted colonies, she would have been guilty of treason against the King. She was his natural born subject, and so continued until the close of the Revolution. She comes within the description of a *British subject*, as given in the 3rd section of the act of May, 1779, chap. 14, as explained by the 5th section of the act of October, 1779, chap. 18. And, although, perhaps, within the letter of the act of May, 1779, chap. 55, § 1, declaring "who shall be deemed citizens," she cannot be considered to be within the meaning of that act, as it cannot be supposed that the Legislature, at the same session,

and as it were, by the same act, declared her to be a *British subject* and a *citizen of the State*. Suppose a citizen of London, not domiciled, but travelling here with his wife, long before the Revolution, had had a child born here, who, with his parents, ever after resided in London; he would be within the *letter*, but I presume not within the *meaning* of the act.

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If she was a British subject and not a citizen of Virginia during the Revolutionary struggle, she was one of those for whose rights the treaty of peace made provision. She was protected by that treaty, with other British subjects, and if no other act of the Legislature had passed, would have been protected by that alone. In October, 1783, chap. 16, the Legislature, however, passed a law "for the admission of emigrants, and declaring their right to citizenship." From the preamble, as well as title, the great object of that law was the admission of foreigners to the rights of citizenship. The first section, however, begins by declaring who shall be deemed citizens, and uses nearly the same words as to *natives*, which are used in the act of May, 1779, above-mentioned. By this act Mrs. *Paradise theretofore declaredly a British subject*, now claims to have been made a citizen of Virginia, without even the necessity of migrating thereto, much less of taking the oath of allegiance, &c. Suppose, instead of being a married woman, she had been an adult male when the act of May, 1779, chap. 14, passed, and instead of entering into the employment of the States, had, by overt act, adhered to the King, was it the intention of the act of 1783 to confer a citizenship without emigration or oath, on such person? Or, in case of emigration, that he should be *ipso facto* and *instantly*, eligible to offices, Legislative, Executive or Judicial? The preamble to the act of 1783 says, "that wisdom and safety suggest the propriety of guarding against the introduction of secret enemies, and of keeping the offices of government in the hands of *citizens*, intimately acquainted with the spirit of the constitution and the genius

1824. of the people, as well as permanently attached to the com-
February. mon interest;" and the latter clause of the first section,
Barzizas prescribes the time of residence and other acts, entitling
v. naturalized citizens to hold offices. Why should a native
Hopkins, of the State, who had adhered to the King during the Re-
See. volution, be more worthy of confidence on his return to
 the country, than a native of Great Britain coming with
 him? Refugees, as they were called, (citizens or natives
 who left the country after the commencement of hostili-
 ties,) were certainly not favorites of the Legislature.

I doubt, therefore, whether the act of 1783 intended to
 reach cases of this kind, and which, as it regarded prop-
 erty, were sufficiently protected by the treaty. It was not
 important or necessary, and I am not satisfied that it was
 according to the policy of the times, to invest natives of
 this description, who did not think proper to return to their
 country, with the character of citizenship, and thus ren-
 dered capable of transmitting, by inheritance, the soil of
 the country to their children, who might be, to all intents
 and purposes, aliens to that country. The treaty, enabling
 them to hold their property, to alien or devise it to citi-
 zens, and to transmit it, by inheritance, to their next of
 kin, being citizens, it appears to me, at present, to be all
 that justice required, or policy rendered proper. I pre-
 sume it never could have been intended, that *native refu-*
gees were intended to be made citizens by that act, even
 if the act of October, 1783, chap. 17, had never been pas-
 sed, although they came within the letter of the act, "*free*
persons born within the territory of the Common-
wealth." The 17th chapter is not enacted as an excep-
 tion to the generality of the words above quoted from the
 16th chapter, so as to leave refugees on the ground of fo-
 reigners generally; but, it excludes either *native* or *citizen*
refugees from the right, even of migrating to, or becoming
 citizens of this Commonwealth. But for this act, they
 would have stood under the former acts, and the act of
 1783, chap. 16, as all other foreigners or natives who were

out of the country, and elected to remain so, only entitled to migrate and become citizens. Surely native refugees would not have been made citizens by the act of 1783, chap. 16, and entitled to all the privileges of citizenship, if the act of the same session, chap. 17, excluding them from the privilege of all the rest of the world, that of migrating and becoming citizens, had not been made. That act was made to except them from the privilege conferred on all the rest of the world; not to except them out of the general expressions of the first act.

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Those words, then, were not intended to be taken in their utmost latitude, any more than the same words used in the act of May, 1779; which, by reason of other laws, did not, as is above shewn, embrace the case of Mrs. *Paradise*. I, therefore, strongly incline to think, that, taking all the laws together, and also, the treaty of peace, with a view of the policy of the country, as expressed in the preamble of the act of 1783, it was not intended that cases like her's should be covered by that act, but left, as to the rights of the parties, under the treaty; and that, if she wished to become a citizen, she was obliged, like all other British subjects, to migrate, and take the oath, &c., required by law.

It does not appear that she ever became a citizen in this way, and consequently, if she was not made a citizen by the act of 1783, she stood under the treaty of peace, and what is called *Jay's* treaty, and no one, except a citizen or a subject of Great Britain, would inherit her real estate.

If she never was a citizen, according to this view of the case, neither was her daughter. But, she died before her mother, leaving the lessors of the plaintiff, her children. Had they migrated and become citizens before the death of their grandmother, they could have inherited her lands as the next of kin. But, when she died, they were natives and subjects of *Venice*, and were not provided for by the treaty aforesaid.

1824. If, however, I am wrong in this view of the case, then
 February. the question arises, whether, taking it that Mrs. *Paradise*
Barziza was made a citizen of Virginia by the act of 1783, and not
 v. before, that will have any effect on the case before the
 Hopkins, Court.
 &c.

If Mrs. *Paradise* was made a citizen by the act of 1783, and the words of that act as to children, *wheresoever born*, can be construed in the present tense thus, a child, whose father or mother *are now, by virtue of this act, or any other act* a citizen, shall be a citizen, then Mrs. *Barziza* was also made a citizen by that act. And, if those words can also have a *prospective*, as well as a *present* interpretation, then any child, born abroad, which Mrs. *Paradise* or Mrs. *Barziza* might thereafter have, would be citizens. Mrs. *Barziza* cannot claim her citizenship by reason that her mother was a citizen at her birth. She must claim it by the operation of those words in the act, construed as aforesaid, and conferring the right of citizenship on her, as the *then* child of her mother, *then* herself, for the first time, made a citizen.

But, if these words can be thus construed, so as to confer citizenship on Mrs. *Barziza*, but cannot be construed also prospectively, then her children, born abroad thereafter, would not be citizens by virtue of the act of 1783. But, the act of 1786, chap. 10, if construed in the same way, would confer citizenship on any such child, born between 1783 and 1786. Whether either of the lessors of the plaintiff would be found to be in this predicament, I have not particularly enquired. I had, at first, some doubt, whether the acts ought not to be so construed; but, on mature reflection, I think they cannot. It is pretty manifest, that these words cannot have both a *present* and *prospective* interpretation; and we must, therefore, give them one or the other. It seems to me most reasonable to give the latter. Suppose an emigrant to this State, between 1779 and 1783, had brought his infant children with him, lea-

ving his adult children in foreign parts. The former would have been citizens under the act of 1779. Was it the intention of the Legislature, by the act of 1783, to confer citizenship, even without migration, on the adults and their children, then, to all intents and purposes aliens to the State? To interpret the act in the present tense, as above stated, would have this effect.

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If the words, then can only be construed *prospectively*, Mrs. *Barziza* never was a citizen, either under the act of 1783 or 1786; nor is she so made by any act of Congress that I can discover. Her children, consequently, were not made citizens; and, as they are not provided for by the treaties aforesaid, the judgment must be affirmed.

Judge CABELL.

Whether the *Barzizas*, lessors of the plaintiff, are citizens of this Commonwealth, capable of taking lands by descent, depends on the question, whether their grandmother, Mrs. *Paradise*, was a citizen at the time of the birth of their mother, Mrs. *Barziza*.

Our Revolutionary struggle, which terminated successfully in the establishment of our Independence, separated us, not only from our former Sovereign, the British King, but from our former brethren, the subjects of the British Empire. In the emphatic language of our Declaration of Independence, it made them, as it did all the rest of mankind, "enemies in war, in peace friends." They became aliens to us, and we aliens to them. There is nothing in the case of Mrs. *Paradise*, to distinguish her from any other subject of the British Empire. Her birth in the former Colony of Virginia, gave her no greater rights than were possessed by any other British subject. At that time the inhabitants of Virginia and the inhabitants of England were equally British subjects, and could mutually inherit lands from each other, whether lying in England or Virginia. But, if Mrs. *Paradise* could, after our

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Revolution, have inherited lands in this country, so might any other subject of Great Britain. She had ceased to be an inhabitant of this country before the commencement of the Revolution; during the whole of its progress, she and her husband remained and resided in England, pursuing their vocations there; they took no part on our side, they espoused not our cause; nor should they be permitted to participate in the fruits of our success, except in the mode prescribed by our laws in relation to other aliens. These are my opinions on general principles, independently of any consideration drawn from our statutory regulations, declaring who shall be British subjects. But, the statute of 1779, seems to me to leave no doubt on the subject. It is impossible to separate Mrs. *Paradise* from that class of persons expressly declared by that statute to be British subjects.

But, it is contended, that, admitting Mrs. *Paradise* to have been previously a British subject, she was, as a native of Virginia, made a citizen by the act of 1783. I do not think it material to this case, and therefore shall not give any opinion, whether Mrs. *Paradise* was, or was not embraced by that act. The *Barzizas* can only claim through their mother. Admit that Mrs. *Paradise* became a citizen by the act of 1783; was Mrs. *Barziza* made a citizen by that act? If she was so, it must be by the operation of the words in the act, "all children wheresoever born, whose fathers or mothers are, or were citizens at the time of the birth of such children, &c." The construction of this act appears to me too plain for ingenuity itself to raise a doubt. It was the intention of the Legislature to establish, not only a general, but a permanent rule, for all cases where citizenship is claimed by right of birth from citizen parents. The right is restricted to children "whose fathers or mothers are, or were citizens at the time of the birth of such children;" but, the right is extended, as well to cases where the birth occurred before, as where it might occur after the passage of the act. Previous cases

are provided for by the words "*were*," and subsequent cases by the words "*are* citizens at the time of their birth, &c." It is no objection to this construction, that the word "*are*" is in the present tense, and must, therefore, have a present signification. Even present time is relative. It may have been present *formerly*; it may be present *now*; or, it may be present at some *future period*. The word "*are*," therefore, although in the present tense, has, when applied to a transaction yet to come, a future signification, and is only equivalent to *shall*, or *may be*. And it must be so construed in the case before us; for, it related to parents who then were, or who might be citizens at the time of births then occurring, or which might thereafter occur. Mrs. *Paradise*, then, not being a citizen at the time of the birth of Mrs. *Barziza*, Mrs. *Barziza* was not made a citizen by the act of 1783, and of course, could transmit to her children no right to inherit lands in this country; nor is the case of her children helped by the British treaty, as they are not British subjects.

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I am, therefore, of opinion to affirm the judgment.

The following was entered up as the judgment of the Court:

The Court, &c., is of opinion, that Mrs. *Barziza* never was a citizen of this Commonwealth, and therefore could not transmit any right of inheritance to lands in this country; that her children, the appellants, are also aliens, and incapable, under the laws, of inheriting lands here; and that, not being British subjects, they cannot claim under the treaty between this country and Great Britain; and, that there is no error in the said judgment. Therefore, it is considered that the same be affirmed, &c.

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DODSON, &c. v. SIMPSON, &c.

An executor who sells or pledges the assets of his testator's estate, for his own use, when he is not in advance to the estate, commits a fraud; and the purchaser or mortgagee, with notice of such improper conduct, at the time of the purchase, will be decreed to make restitution.

But, if the purchaser or mortgagee has not notice of the fraud at the time of the purchase, &c., he will be protected as a purchaser without notice.

John A. Pride died, leaving a will, by which he appointed *John Simpson* his executor, and *Elizabeth B. Simpson*, wife of the said *John*, his residuary legatee. *John Simpson* administered on the estate, and *Daniel Dodson* and *Michael Wells*, became the sureties in his executorial bond. *Simpson* becoming much involved in his circumstances, conveyed two of the slaves of his testator's estate, in trust to secure a debt of his own, due to *A. & R. M. Cunningham*. Shortly afterwards, *Simpson* absconded from Petersburg, where he resided, and the said property was taken possession of by *Moore*, the trustee.

Dodson and *Wells*, the sureties of *Simpson*, in his executor's bond, filed a bill in the Chancery Court of Richmond, stating the foregoing facts, making *Simpson* and his wife, *Mary Covington*, a legatee in the will, *William Moore*, the trustee, *A. & R. M. Cunningham*, defendants. The bill alleges, that *John A. Pride* died considerably indebted: that but few of his debts have been paid: that the estate has been greatly wasted, and applied to the payment of the private debts of *Simpson*: that, he is involved to an amount greater than his own property, and that of his testator, could pay: that the complainants are informed, that it is the intention of *Moore* to sell the said property within a very few days: that they, as the sureties of *Simpson*, as executor of *Pride*, will undoubtedly be called on to pay all the debts due by the said *Pride* at his death, and now unpaid: that, although *Elizabeth B.*

Simpson is the residuary legatee of the said *John A. Pride*, she cannot claim the property aforesaid, until the debts and legacies are paid; and *John Simpson* could not legally convey it in trust to pay his own debts, till he had paid the debts and legacies of his testator: that, it is their intention to apply to the next County Court of Chesterfield, to rule the said *Simpson* to give counter-security for his executorship; but, if the sale of the said slaves should not be prevented, the complainants believe that such application would be fruitless, as, before that Court, the remaining assets of the estate will be wasted: that, besides the claims of the *Cunninghams*, several attachments have been served on the property conveyed by the deed of trust, for the private debts of *Simpson*, under the law relating to absconding debtors. They, therefore, pray for an injunction to prevent the defendants from proceeding to sell, convey away, or otherwise dispose of, the two slaves aforesaid, belonging to the estate of *John A. Pride*, deceased, until further order; and that *John Simpson* may be compelled to settle his accounts as executor.

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The Chancellor denied the motion for an injunction; but it was afterwards awarded by a Judge of this Court.

The answer of *A. & R. M. Cunningham*, states, that *John Simpson* became indebted to them for merchandize, and gave his negotiable note, for the same: that, *Simpson* being unable to pay when it fell due, executed the deed of trust mentioned in the bill: that, when the time had nearly expired, within which the money was to have been paid, the defendants, with the consent of *Simpson*, assigned their interest in the property included in the deed of trust, to *Leslie* and *M'Indoe*, they having become responsible to the defendants, for the debt due from the said *Simpson*: that, the first intelligence they received that there was any doubt respecting the two negroes included in the deed, was from the bill of the complainants: that they are advised, that *Simpson* had a legal authority to dispose of these negroes in the manner he has done, to sell them to any person

1824. he pleases, and to apply the money as he may think proper; the legatees or distributees having their recourse to the executorial bond: that, if the sureties can prevent the executor from selling these negroes, the executor will be shackled in such a manner as not to be able to administer the assets: that, *Elizabeth B. Simpson* was in fact a specific legatee, and her husband, the executor, had the same right to assent to the legacy that he would have in any other case; in which case, the property became liable for his debts; and his sureties must stand in the same situation, (and no better,) as other sureties.

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Moore answered, denying all personal knowledge of the transaction.

The complainants filed an amended bill, stating, that the complainant *Daniel Dodson* had since obtained administration *de bonis non*, with the will annexed, on the estate of the said *John A. Pride*, in consequence of *Simpson* having failed to give counter-security: that the complainant *Daniel* immediately took the slaves into his possession; but, he is fearful, without the aid of the Court, the said slaves will be sold under the deed of trust and he be harrassed with a suit for the recovery of them: that there is a material difference between the *actual sale* of a slave of his testator by an executor, to an ignorant and innocent purchaser where the money is *actually paid*, and the mere *pledge* of such slaves, by an executor, on a conveyance in trust, to secure the payment of his own private debts, *previously* contracted. They pray, that *Leslie* and *M'Indoe* may be made defendants; and that all the defendants may be enjoined from proceeding to sell the slaves aforesaid, until the debts of the said *John A. Pride* shall be paid off; unless they will, in the first place, enter into bond and security to indemnify the complainants against such debts; and that they may be restrained from commencing suit against the complainant *Daniel* for the said slaves, until the debts aforesaid shall be discharged.

The Court of Chancery, on motion, dissolved the injunction, and an appeal was allowed by this Court.

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Spooner, for the appellant, contended, that it was not competent to *Simpson* to pledge his testator's estate, to the injury of sureties or creditors. The authorities are decisive, that an executor cannot *bequeath* the assets of his testator. 11 *Viner*, p. 421; *Plowden*, 525. The modern cases are still more favorable to creditors. The case of *Farr v. Newman*, 4 Term: Rep. 621, proves, that assets, although a considerable time in the possession of an executor, cannot be taken in execution for his private debts. In 5 *Vesey*, p. 211, 212, it is decided, that a power to *sell* does not include a power to *pledge*, even as to chattels which cannot be traced. He also relied on the cases of *Hill v. Simpson*, 7 Ves. p. 152, and *M'Leod v. Drummond*, 14 Ves. p. 352. An executor is like a *factor*. He may *sell*, but cannot *pledge* the estate of his principal. 1 *Livermore*, p. 129, 130; 5 *Ves.* 211, 212; *Robertson v. Ewell*, 3 Munf. 7.

No Counsel, for the appellees.

February 12. The Judges delivered their opinions.*

Judge GREEN.

A factor cannot pledge or deliver the property of his principal for the satisfaction of his own debt, since the legal title to the property is in the principal, and not in the factor, the latter having a special authority to sell the property for the use of his principal only. The case of an executor differs from this. The legal title is in him, and his disposition of the property, for any purpose, passes the legal title effectually. Yet the executor holds the legal title

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in trust for creditors and legatees, whether specific, pecuniary or residuary. As to them, he is guilty of a breach of trust, when he disposes of the testator's property in any way, for his own use. And, as in all other cases, where a trustee has parted with the legal title, in breach of his trust, the *cestui que trusts* may pursue the property into the hands of a purchaser, with notice of the trust and of the breach of trust; so they may, in the case of an improper sale, or other improper disposition of the testator's assets, when the purchaser has notice of the existence and violation of the trust. For, in that case, the purchaser is guilty of a fraud, and on that account is held to be himself a trustee. But, in such case, as in all other cases, a purchaser of the legal title, without notice of the trust and of the breach of trust, being guilty of no fraud, nor of such gross negligence as amounts to evidence of fraud, may protect himself by the plea of purchase without notice; and a mortgagee for a precedent debt, is a purchaser to all intents and purposes. Accordingly, all the cases on this subject, have turned upon the enquiry, whether the purchaser had notice of the trust and of its breach. If he had notice of the existence of the trust, it did not follow, that the disposition of the property was, of course, a breach of the trust; for, it is a part of the trust that the executor shall sell or raise money upon the property, for the use of the testator's estate; and even in the case of a disposition of the property, manifestly known by the purchaser to be for the executor's own use, and not for the use of the estate, it does not follow that the purchaser is chargeable with notice of the breach of trust. That must depend upon the whole circumstances of the case: As, if the executor had settled his accounts, and appeared to be a creditor, when in fact he was a debtor; or, if the executor was himself a legatee of the property disposed of, and the purchaser had no reason to believe that his legacy was necessary for the payment of debts. In such cases, the purchaser might justly suppose, that the executor was disposing of the pro-

erty fairly and *bona fide*, and the purchaser could not be charged with fraud. The fact, that the property is pledged or delivered by the executor for the satisfaction of his own precedent debt, is only important, as it proves that the purchaser knew that the executor was applying the property to his own use; and if, from other circumstances, it appears that he knew also, that he was so applying it improperly, and in breach of his trust, then the purchaser is chargeable with fraud. As, if the executor should give a specific legacy, bequeathed to another, in satisfaction of his own debt, it would necessarily follow, that he was violating his duty, unless the estate was indebted to him. For, such legacy could not properly be disposed of for any other purpose but for paying the testator's debts; and *prima facie*, the disposition of it in satisfaction of his own debt, has no tendency to satisfy the testator's debts.

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I think the administrator *de bonis non* has an equity, which may be asserted in a Court of Chancery.

To apply these principles, which are elaborately discussed in 14 *Ves.* 355, and 17 *Ves.* 153, to the case at bar. It is not alledged, and does not appear, that the appellees, *A. & R. M. Cunningham*, knew that the slaves in question were assets of the estate of *Pride*. The answer is, however, somewhat evasive on that point. But, if they did know that fact, they knew, at the same time, that the wife of the executor was the residuary legatee of the whole estate; and, it does not appear, that they knew, or had any reason to believe, that any debts were due from the testator's estate, or that the negroes in question were necessary for the payment of debts and legacies. And, in the absence of such facts, they might have taken a *lien, bona fide*, upon the property, as the property of *Simpson*, their debtor. As to the charge in the amended bill, that *Simpson* never had any possession of the property, but as executor, it is completely repelled by the execution of the deed, by *Simpson*, conveying the property as his. It is true, that an executor, who is also a legatee, taking posses-

1824. *February.* sion of the testator's property, is considered as taking possession as executor; for, he cannot, in the first instance, take it rightfully, in any other character; and he shall be presumed to have possessed himself rightfully, and not wrongfully. And, being originally so possessed, as executor, such possession shall be presumed to continue in the character in which it was acquired, until he does some act, shewing unequivocally, that he elects to hold the property in his character as legatee. No act can be more decisive to shew such election, than a conveyance of the property as his own, for securing the payment of his own debt. An answer, therefore, to this charge, was wholly unnecessary. The circumstance that the legal title is in the trustee, can make no difference in this case. The decree is right, and should be affirmed.

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This decision will not preclude the appellants from asking a reinstatement of the injunction, or from pursuing the fund, if they shall hereafter establish the charge of a fraudulent disposition of the assets by the executor, and the participation in such fraud by the purchasers.

Judge COALTER.

I have no doubt, that a sale by an executor, for the purpose of paying his own debt, and *a fortiori*, a deed of trust made by him, to secure the payment of his own proper debt, when he is not in advance to the estate, so as to make such sale or incumbrance proper, is a fraudulent waste of the assets; and that, if the person purchasing, or in whose favor such trust is created, has a knowledge of, and consequently participates in, such fraud, the transaction may be set aside, either in favor of creditors, legatees, or an administrator *de bonis non*, with the will annexed; and, if these do not interfere, because the executor has given security, and they are satisfied to rest on that security, such sureties, it appears to me at present, have a right to call for a settlement of the estate, and to have these assets,

thus fraudulently eligned, so secured as that damage shall not arise to them, from such fraudulent combination; but, if I am wrong as to the rights of the sureties in this case, the administrator *de bonis non* is before the Court in the amended bill. The executor has not answered; but, it is alledged, has absconded, and left the country; so that the fraud, as to him, is undenied, and probably undeniable.

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Can this fraud be brought home to the appellees? Their answer, as to their knowledge that the slaves in question were of the goods of the testator, appears to me to be evasive; which may perhaps arise from that not being explicitly charged in the bill; and they seem to rely very much on the fact stated in the bill, that the wife of the executor was residuary legatee.

• If the appellees in this case knew that the slaves were part of the assets, what are the circumstances? The deed of trust is taken within about eight months after the qualification of the executor, who seems to have been a saddler, or shop-keeper of some kind in Petersburg; and, it is to secure *A. & R. M. Cunningham*, the appellees, probably merchants of the same town, the sum of \$2,545 56, due by negotiable note, endorsed by *Francis Y. Yancey*, and payable in sixty days after the date of the note and deed. It conveys all the articles of saddlery and merchandize in the shop, all his household and kitchen furniture, and several slaves; amongst others, those in controversy. It was stipulated, that when the note fell due, if it was not paid, the appellees, having given ten days notice before the time of payment, by a writing, to the debtor, left at his shop, if the note should not be punctually paid, the trustee should sell, &c. All this convinces me, that *Simpson*, the executor, was in desperate circumstances; and that the appellees knew it at the time this deed of trust was taken. They did not, at that date, advance \$2,545 56; relying on the note and security then taken, and believing their debtor a man in good circumstances. It was an old debt, for which a new note and deed of trust, authorising unexampled pro-

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ceedings, were taken. They could not have presumed that a man so pressed had paid monies in advance to the estate, which would justify a conversion of the assets to his own use. They were at least bound to enquire, and must have winked hard not to see, that a palpable fraud was committing. This is a very different thing from a man's purchasing out and out, from an executor, who is committing a fraud. He has no inducement to pay his money, and take the risque of such fraud, and has no interest in shutting his eyes.

Whilst, therefore, I think the evidence, as to the knowledge of the appellees, that the slaves in question were part of the assets belonging to the estate, is not sufficient to justify a decree against them on a final hearing, (though from their residing in the same town, and the circumstance that the executor was much in debt, and that to themselves, they probably had a knowledge of his property,) yet I do not think the answer such a denial on this subject, as to justify a dissolution of the injunction on the merits. I think it might well have been dissolved and a sale directed, on the appellees giving security to abide by the final decree, or directing the money to be paid into Court, subject to its final order. These provisions not being made, but the dissolution being, as I presume, on the merits, I think the decree is erroneous, and must be reversed, and the injunction dissolved on the terms aforesaid, and the cause remanded to be finally proceeded in.

Judge CABELL.

There is no difference of opinion as to the principles applicable to this case. We all agree, that if an executor commits a fraud by improperly selling or pledging the assets of the estate, and the purchaser or mortgagee is a participator in that fraud, the sale or mortgage should be set aside as fraudulent. I agree with the Judge who first delivered his opinion, that no such evidence of participation

appears against the appellees, who claim under the deed of trust contained in the record. The transaction, as to them, may have been perfectly fair, and there is no evidence in the record to shew it otherwise.

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I concur, therefore, in the opinion to affirm the decree. This, however, will not preclude the appellant from obtaining redress by exhibiting and establishing a new case. Decree affirmed.

JONES'S Administrator v. HOOK'S Administrator.

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In an action brought in Virginia, on a judgment obtained in North Carolina, the act of limitations of N. Carolina cannot be pleaded in bar; but, the law of the *former* must prevail; the act of limitations affecting the *remedy*, and not the *right*.

Now, *as it seems*, does the act of limitations of Virginia apply to such a case.

On the 11th day of September, 1811, the administrator of *Agnes Jones*, deceased, brought an action of debt against the administrators of *John Hook*, deceased, in the Superior Court of Law for Bedford county, on a judgment obtained in North Carolina for 206*l.* 5*s.* 8*d.* of the currency of North Carolina, equal to 154*l.* 13*s.* 7*d.* Virginia currency, including costs. The North Carolina judgment was obtained in the County Court of Warren of that State, in February, 1800, a copy of which, duly authenticated, was produced in Court.

The defendants pleaded, 1. *Nil debet*, on which issue was joined; 2. That the action was founded on a judgment obtained in North Carolina; that, by a law of that State, actions to revive judgments obtained in the Courts of the said State, must be sued and prosecuted within years

1824. next after the rendering of such judgment; and, that the
February. plaintiff did not prosecute this action within the said time.

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The plaintiff replied to the last mentioned plea, that, from the time of rendering the judgment in the declaration mentioned, the plaintiff's intestate was out of the Commonwealth of Virginia until her death, to wit: in the State of North Carolina; and that since her death, the plaintiff, her administrator, has been out of the Commonwealth of Virginia, to wit: in the State of North Carolina, from the day of , until the bringing of this action.

The defendants rejoined, that neither the intestate of the plaintiff, nor the plaintiff, since her death, have been inhabitants or citizens of the Commonwealth of Virginia, but have been citizens and inhabitants of the State of North Carolina from the date of the judgment and at the time thereof, on which this action is founded, until the commencement of this action.

To this rejoinder the plaintiff demurred; and he demurred, also, to the second plea.

The following agreement of facts, was entered into by the parties, viz: that in the year 1796, *Agnes Jones*, the plaintiff's intestate, instituted an action of detinue in the State of North Carolina, against *John Hook*, the defendant's intestate, who was then within the jurisdiction of the State of North Carolina, but an inhabitant of Virginia, and obtained a judgment against him in the year 1800, for the sum of £200, Carolina currency. *John Hook*, in the year 1796 or 1797, returned from North Carolina to Virginia, where he then lived, and continued to live, until his death, without having satisfied the said judgment, and died in the year 1808. *Agnes Jones* remained in the State of North Carolina from the time of the said judgment until her death; and the plaintiff, her administrator, has not been within the limits of this Commonwealth until the year 1810, the year before the institution of this suit. By the law of North Carolina, actions of debt, on simple contracts, must be brought within three years after the cause of ac-

tion accrued. Upon this statement of facts, it was submitted to the Court, whether the defendants could avail themselves of the act of limitations of this State, or of the aforesaid act of North Carolina, to bar the plaintiff's claim.

The Court gave judgment for the defendants, and the plaintiff appealed to this Court.

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Leigh, for the appellant.

The question is, whether the appellee could avail himself of an act of limitations of North Carolina, in bar of an action brought in Virginia, on a North Carolina judgment. Even if this question should be decided in the affirmative, the acknowledgment of the executors that the debt has never been paid, would take the case out of the statute.

If a law of North Carolina can be pleaded to a suit in Virginia, the laws of that State must have force here. But, admitting that it can be so pleaded, it does not apply in this case; because, the law relied upon in this instance, is one relating to *simple contracts*, and does not apply to *judgments*. If it be said, that a *judgment* of North Carolina is only a *simple contract* in Virginia, I answer, that the law in question speaks only of *simple contracts* in North Carolina, and the subject of this suit was, unquestionably, in North Carolina, a *judgment*.

But, this question must be decided by the laws of Virginia, and not of North Carolina. The act of limitations has always been held to affect the *remedy*, and not the *right*; and, therefore, wherever an action is brought, it must obey the law of the *forum*, and not of the place of contract. These principles are fully supported by the cases of *Williams v. Jones*, 13 East, 439; 2 *Mass. Reports*, p. 84; 5 *Johns. Reports*, 132; 3 *Johns. Reports*, 263, *Ruggles v. Keeler*.

If the law of Virginia is to give the rule, and not that of North Carolina, there is no obstacle to the recovery of the appellant, because no part of the act of limitations of

1824. Virginia applies to *foreign* judgments. But, if it does
February. comprehend such a case, the appellant falls within the ex-
 ceptions of the act, as neither the plaintiff nor his intestate
 Jones's was ever in Virginia from the time when the judgment
 adm'r. v. was obtained, until the year 1810.
 Hook's adm'r.

Johnson, for the appellees, said, that he did not expect the Court to affirm the judgment, but to send it back with instructions. The only question is, whether the Court can decide the cause, on the case agreed, either for the plaintiff or the defendant? The case agreed ought to set forth such facts as to enable the Court to pronounce a judgment. *Brewer v. Opie*, 1 Call, 212.

In this case, three things are necessary to be ascertained; 1. That a Court of North Carolina can proceed *ex parte*; 2. That the Court of North Carolina is a Court of Record; 3. That, according to the laws of North Carolina, a judgment is a *record*, and not a *simple contract*.

As to the argument, that the agreement of the parties that the judgment has not been paid, takes this case out of the operation of the act, the answer is, that an administrator cannot, by his mere declaration, take a debt of his intestate out of the operation of the statute.

The case agreed states, that *every simple contract* is barred by the act of North Carolina. No exceptions are stated, and, therefore, none can be presumed to exist.

The territorial rights of Virginia are not infringed by this doctrine; because, it proceeds on the supposition, that the law of *Virginia* permits the operation of the act of limitations of N. Carolina within the limits of the former State; and Virginia can repeal the rule whenever she thinks proper.

The question is, whether this limitation of North Carolina be a part of the *contract*, or only affects the remedy? There is nothing in the case agreed, to shew that the law in question relates only to the *remedy*. Upon this principle, it is to be presumed that parties, in making their contracts,

take into view the prospect of recovery, and the terms on which it can be had, and adapt their contracts to the existing state of the law. The case from Massachusetts is no authority, and proceeds on the erroneous supposition, that my doctrine would interfere with the jurisdiction of an independent State; whereas, it is perfectly clear, that the doctrine does not suppose any *inherent* authority in the foreign law, but only gives it effect as far as the independent State chooses to permit.

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The case from *East*, is in my favor; because, it establishes the principle, that when the right is extinguished by the law of a foreign country, it is lost altogether. In *North Carolina*, there can be no doubt that all *remedy* was lost in this case, if the law bears the construction that I have put on it; and, the remedy being lost, the *right* also was gone, if the maxim be true, that there is *no right without a remedy*. The *right*, therefore, was extinguished every where.

That actions on foreign judgments are classed among *simple contracts*, is proved by 1 *Chitty's Pl.* 102, 98, and *Phill. on Evid.* 254.

The case agreed furnishes no information, whether a *judgment* in North Carolina is considered as a *simple contract*, or not.

In England, the judgment of a Court, not a Court of Record, is on the footing of a *foreign* judgment. We cannot say, from any thing in this record, whether the Court which rendered this judgment was a *Court of Record*.

The act of limitations is pleaded in *bar*, and not in *abatement*. A judgment in North Carolina would have been a conclusive bar to an action for the same cause in Virginia. It is true, that a new assumpsit will take a case out of the act of limitations. But, the assumpsit only *revives* the original cause of action, and does not create a new one.

Time is always an important part of a contract.

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adm'r.
v.
Hook's
adm'r.

Lord Kaimes, book 3, ch. 8, § 6, p. 364, says, that in Scotland, length of time, which would be a *bar* in England, may be used as a *presumption*, though not by *plea*. Apply this doctrine to the present case.

The judgment of a Court, *not of record*, is a *simple contract*. The case agreed, does not find that the Court of North Carolina was a *Court of Record*. It does not appear whether this judgment was rendered on the appearance of the defendant. A foreign judgment not obtained on the personal appearance of the defendant, is of no authority whatever. *Phill. on Evid.* 254, ch. 3, § 3; *Buchanan v. Rucker*, 9 East, 192.

But, the Constitution of the United States, art. 4, § 1, has a decisive influence on this case. This clause relates to the *effect* of the records themselves, and not merely to the *mode of authenticating them*. The law of Congress, 1 vol. p. 115, fully confirms this construction, and explains this article of the Constitution; and the decisions of the Supreme Court are in the same spirit. *Mills v. —*, 7 Cranch, 481; *Hampton v. M'Connell*, 3 Wheaton, 234.

Leigh, in reply.

As to the objection, that it does not appear that this judgment was obtained after process served on the defendant, the case agreed states, that *John Hook* was within the jurisdiction of the Court. It is to be *presumed*, that the Court of North Carolina was a Court of Record, unless the contrary appears. It is the defendant's duty to shew that he is *within* the act of limitations; and not the plaintiff's duty to shew that he is *without* it. In North Carolina, this was a *judgment*; in Virginia, it is said to be a *simple contract*; therefore, the act of limitations would be a bar in Virginia, while it would not in North Carolina !

All writers agree, that the act of limitations affects the *remedy*, and not the *right*. The power of reviving a

contract by a new assumpsit, proves that the act relates merely to the *remedy*. A plea of the act of limitations is certainly a plea *in bar*; but, this is merely because it destroys the *action*.

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adm'r.

As to the Constitution of the United States, and the decisions of the Supreme Court, they only prove that no plea shall be admitted to *falsify* the original judgment.

February 14. Judge GREEN.

The appellant brought an action of debt against the appellees, on the 11th day of September, 1811, upon a judgment recovered by the intestate of the appellant against the intestate of the appellees, in the County Court of Warren, in North Carolina, in February, 1800; and the declaration makes *profert* of the record of that judgment. After a variety of pleading, the parties agreed a case to this effect: that such a judgment was rendered as is set out in the declaration, which was never satisfied, either by *Hook*, or his administrators: that the original suit was brought in North Carolina, in 1796, when *Hook*, then an inhabitant of Virginia, was in North Carolina: that *Hook*, in 1796 or 1797, returned to Virginia, and continued to reside in Virginia, until the time of his death, in 1808: that the testator of the appellant remained in North Carolina, until her death; and her administrator was never in Virginia, until 1810: that, by the law of North Carolina, actions of debt on simple contracts must be brought within three years after the cause of action accrued; and they agreed, that if the defendants could avail themselves of the act of limitations of Virginia, or of the aforesaid act of North Carolina, to bar the plaintiff's claim, judgment should be given for the defendants; otherwise, that judgment should be given for the plaintiff for \$ 400, and \$12 60. Upon this case, the Court gave judgment for the defendants, and the plaintiff appealed.

1824. This agreed case admits the validity and obligatory effect of the North Carolina judgment, unless that effect be obviated, either by the law of North Carolina, stated in the agreed case, or by the statute of limitations of Virginia.

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The statute of Virginia has no effect upon the case; for, even if it came within any of the provisions of our statute, as it does not, it falls within the exceptions of the statute.

The law of North Carolina, as agreed by the parties, is strictly an act of limitations; for, it is a limitation of the remedy, and does not affect the right, further than by refusing a remedy. The cases cited at the bar, shew that the general rule is, that rights as to personal and transitory things, are to be determined by the laws of the country where the right accrued; but, that *remedies* are to be governed by the laws of the country in which the remedy is sought. If, therefore, the limitation as to the remedy found in the law of North Carolina would have applied to this case, if the remedy had been pursued in that State; yet, it does not apply to any remedy pursued in Virginia. It is probable, that even in North Carolina, the act limiting actions of debt on simple contracts to three years, could not apply to an action on the judgment in question. The counsel for the appellees, in the Court below, supposed that, as at the common law, an action on a foreign judgment was an action on a simple contract, that the statute of North Carolina, limiting actions of debt upon simple contracts, properly applied to this case, if any statute of limitations of North Carolina could apply to the case; overlooking the Constitution and laws of the United States, which give to judgments of any of the United States, the same effect in all the other States, as they have in the State where they are rendered.

The judgment is to be reversed, and entered for the appellants, according to the agreement of the parties.

Judge COALTER.

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Hook's
adm'r.

I have not considered it necessary in this case; and not having some of the authorities referred to, have therefore made up no opinion on the question, whether, if there is any statute in North Carolina by which this action could be barred there, that statute would operate here; and, indeed, as it is admitted by the case agreed, that neither the intestate of the appellees, nor the appellees themselves ever were in the State of North Carolina after the rendition of the judgment in question, so as to be amenable to process there, it is not to be presumed that a statute so unjust can exist.

Our statute of limitations, I think, does not extend to the case; and, if it did, the facts agreed would bring it within the exceptions in that statute.

It is admitted by the case agreed, that the judgment in question is a subsisting judgment unsatisfied, and of course that the action of the appellants is sustainable thereon, unless the statute of limitations of North Carolina, in relation to simple contracts, or our statute of limitations, is a bar to the action.

In regard to the former, it is alledged, that the case agreed is imperfect, because it is not stated whether the intestate of the appellees had been served with process in North Carolina, or whether the judgment was against him as an absentee; nor is it stated, whether the judgment was in a Court of Record or not; and, if in a Court of Record, still that the judgment has no greater force in this State, than a simple contract.

According to my view of the case, these questions, at most, would only have been important on the trial, had the defendants wished to impeach the judgment; but, this matter is put to rest by the case agreed, which admits the validity of the judgment.

Admitting every thing that would shew, that this judgment had no more validity than a simple contract, and the

1824. foundation of it subject to be impeached, it does not follow
February. that a judgment of any kind is a *contract*. The law of
 Jones's North Carolina, the substance of which is stated in the
 adm'r. case agreed, relates to *contracts*, not to *judgments*. What
 v. the law is there, in relation to judgments, has not been
 Hook's stated; doubtless, because it would shew, that this suit
 adm'r. would not have been barred by it in that State. The idea
 seems to have been, that, supposing it to have no more va-
 lidity here than a *simple contract*, that either the law of
 that, or of this State, in relation to *such contracts*, would
 be a bar. Our law does not apply, as before stated; and
 the most that could be contended, would be, that this ac-
 tion, if prosecuted in North Carolina, would be barred
 there. But, no such law is shewn; and, therefore, the
 question, whether such law, if it did exist, could avail the
 party here, does not arise.

The judgment must, therefore, be reversed, and entered
 for the appellants.

Judge CABELL.

The case agreed admits the judgment on which the ac-
 tion is brought, and admits, moreover, that it has never
 been satisfied. The only question between the parties is,
 whether the action is barred by the act of limitations of
 North Carolina or Virginia.

I consider the law as clearly settled, that whatever re-
 lates to the essence of the contract, is to be governed by
 the law of the place where the contract was formed; but,
 that what relates to the remedy for enforcing the contract,
 is to be governed by the law of the place where the con-
 tract is sought to be enforced. According to this princi-
 ple, it is the act of limitations of Virginia, and not that of
 North Carolina, to which we must look, in deciding this
 cause; and, if the case comes within our act, it is also
 manifest that it comes within the exceptions to the act.

The judgment must, therefore, be reversed, and entered for the appellant, according to the case agreed.*

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* Judge BROOKE, absent.

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MUNFORD and others

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v.

OVERSEERS OF THE POOR OF NOTTOWAY.

The Sheriff was bound, formerly, to collect the poor-rates, if appointed by the Overseers of the Poor, but not otherwise; and the sureties to his official bond were responsible for them. The law, as it now stands, makes it the official duty of the Sheriff to collect the poor-rates in all cases.

A judgment against a principal in a bond, is not *conclusive* evidence against his sureties.

Where the principal and sureties are sued jointly, and the judgment is erroneous as to the sureties, it must be reversed as to all; although the judgment would have been good against the principal, if he had been sued alone.

This was an action of debt, brought in the Superior Court of Law for Nottoway county, in the name of the Governor of Virginia, for the benefit of *Royall* and others, Overseers of the Poor for the said county, against *Munford* and others, on a bond given by the said *Munford*, for the faithful discharge of his duties as Sheriff, with the other defendants as his sureties. The declaration recites the condition of the said bond, in the following words: "If, therefore, the said *James H. Munford* shall well and truly collect all levies, and account for and pay the same, in such manner as is by law directed; and also, all fines, forfeitures, and amercements, accruing or becoming due to the Commonwealth in the said county, and shall duly ac-

1824. count for and pay the same to the Treasurer of this Commonwealth for the time being, for the use of the Commonwealth, in like manner as is, or shall be directed in case of public taxes, and shall, in all other things, truly and faithfully execute the said office of Sheriff, during his continuance therein, then the above obligation to be void; otherwise, to remain in full force and virtue." The breach assigned is, that after the execution of the said bond, "a judgment was recovered in the County Court of Nottoway, against the said *Munford*, who had been duly appointed collector of the poor-rates for said county, in favor of the said Overseers of the Poor, for the sum of \$100 73 cents, and for \$12 4 cents costs, which sum of \$100 73 cents, was the amount of poor-rates collected by the said *James H. Munford* for the year 1815, and which he had failed, neglected and refused to pay over and account for, according to law, to the said Overseers;" and, that the judgment and costs have never been paid.

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of Poor, &c.

Some of the defendants, including *Munford*, the principal obligor, appeared and pleaded "conditions performed," and the plaintiffs replied generally. By consent of parties, leave was given them to give special matters in evidence.

The jury found a special verdict to this effect: that *James H. Munford* was duly appointed and qualified as Sheriff of the county of Nottoway for the year 1815; that he was not appointed or notified of his appointment as collector of the poor-rates in the said county, unless the judgment offered in evidence by the plaintiff, obtained against him by the Overseers of the Poor in the County Court of Nottoway should be considered as conclusive evidence of his appointment of collector of poor-rates. If, therefore, the law be for the plaintiffs, they find for the plaintiffs the debt in the declaration mentioned, &c.; otherwise, they find for the defendants.

The Court gave judgment for the plaintiffs, and the defendants obtained a supersedeas.

Gilmer, for the appellants.

No Counsel, for the appellees.

February 18. Judge GREEN.

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&c.
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of Poor, &c.

I think, that upon a just construction of the various acts of Assembly, passed from time to time before that of February, 1821, upon the subject, the Sheriff was bound *ex officio* as Sheriff, (if appointed by the Overseers of the Poor to do so, but not otherwise,) to collect the levies for the support of the poor, generally called poor-rates; and that it was not necessary that he should execute a separate bond with security, to the Overseers of the Poor, as collector of the poor-rates; but, he was bound by his official bond, together with his sureties thereto, to collect and account for them, *if appointed to do so by the Overseers*, but not otherwise. It is unnecessary to go at large into an examination of those Acts of Assembly in this case, as the cause turns on another point, on which the appellants are entitled to a judgment in their favor.

The jury have found, that *Munford* was not appointed by the Overseers of the Poor, to collect the poor-rates, unless a judgment recovered by the Overseers against him, as collector, was *conclusive* evidence of that fact; that is, unless such judgment precluded and estopped the sureties from giving any evidence going to contradict that fact.

The question, how far sureties are bound by a judgment, or other evidence against their principal, which estops or concludes him, has never, as far as I am informed, been settled in this Court, except in the case of *Baker v. Preston*, and his sureties, Gilm. Rep. p. 235, decided in a Special Court. In that case, it was decided, that the Treasury books kept by *Preston*, were conclusive evidence against him, and estopped him from giving any evidence to contradict them, and that his sureties were in like manner estopped and concluded. The Court argued, that if a

1824. judgment against the principal would conclude his sureties,
February. so ought the evidence on which such judgment is rendered,
Munford, to conclude them; and the case of *Braxton v. Winslow*,
Ex. 1 Wash. 31, and *Greensides v. Benson*, 3 Atk. 248, were
v. the cases, and the only cases relied upon, to shew that a
Overseers judgment against the principal was conclusively binding
of Poor, &c. on the sureties. No such point was decided in *Braxton*
v. Winslow, either as reported in 1st *Washington*, or in
Call's manuscript report of the case; and, neither the
 Court, in the judgment reported in *Washington*, nor any
 Judge, (all of whom gave their opinions *seriatim*, as re-
 ported in *Call's* manuscript,) intimated, in the most re-
 mote way, that a judgment, either in the first instance
 against the executor, establishing the demand against the
 testator's estate, or an after-judgment against the executor,
 establishing a *devastavit* by him, were, to any purpose,
conclusive against the sureties. They only decided, that
 until a creditor had established his demand and a *devasta-*
vit by such judgments, he was not entitled to sue the sure-
 ties of the executor, upon the official bond of the execu-
 tor. So far as the Court decided, that it was necessary to
 establish a *devastavit* against the executor in a separate
 suit against him, before a suit could be maintained against
 his sureties, the decision was extra-judicial, as the question
 did not arise in that case; yet, it was considered as giving
 the law of the country, until it was corrected by a Legis-
 lative act. The Court, however, might well have decided,
 that an original judgment against the executor, so far as it
 went to establish a demand against the estate of the testa-
 tor, could not be controverted by the sureties of the execu-
 tor in a suit upon his official bond. For, the condition of
 that bond is, that the executor shall administer the assets
according to law. A judgment, whether rightful or
 wrongful, until reversed, bound the assets; and, *accord-*
ing to law, the executor was bound to apply the assets in
 a due course of administration, to the payment of such
 judgment; and, if he failed to do so, the bond was forfeit-

ed. As to the case put in the report of *Braxton v. Winslow*, both in print and manuscript, (by way of illustration, (of the correctness of which I doubt,) the Court did not intimate that a judgment against *C.* would be *conclusive* of the amount of the debt against *B.*

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The case of *Greensides, &c. v. Benson, &c.*, as reported in the first edition of *Atkyns*, is almost unintelligible; but, even from that report, when analyzed, it can be ascertained, that, in fact, the judgment against the administratrix did not, in any way, operate to the prejudice of her sureties; nor, was it used against them to any purpose. For, it was admitted by the counsel for the plaintiffs, that a true inventory had not been returned; and that fact was established by the judgment against the sureties, without resorting to the judgment against the administratrix; and the sureties had the same relief precisely, as if no judgment had been rendered against the administratrix establishing a *devastavit*. The observations attributed to the Chancellor, in relation to the effect of that judgment, if made, were not followed up in the decree; and, it appears from a copy of the decree from the Register, (in a note to the report of the case in the last edition of *Atkyns*,) that the report was erroneous; for, the decree was, that the injunction should be continued until an account was taken of the administration of the assets by the administratrix, without regard to the judgment against her (which ascertained that she had £226 in her hands, unadministered;) and that, upon her paying, or her sureties paying, the balance of the assets found not to be duly administered upon such account, and all costs, the injunction should be perpetuated; or, in case of a failure to pay such balance and costs, the judgment for the penalty of the administration bond, should stand as a security only for such balance, and the costs. This case is also reported in *Ridgeway*; and a totally different representation of the observations of the Chancellor is there given, from what they are represented to be in *Atkyns*. In *Ridgeway*, the Chancellor is reported

1824. ed to have said, that the sureties ought not to be bound by
February. the judgment against the administratrix, it being a judgment by default, and they not being parties to the suit.
Munford, And that this was really the ground upon which the Court
&c. proceeded, appears from the terms of the decree, copied
v. from the record, which corresponds with the declaration
Overscers attributed to the Chancellor, in *Ridgeway's* report of the
of Poor, &c. case. This case is abridged, to a different purpose, in the 6th volume of the supplement to *Viner's Abridgement*, and is cited in 1 *Coxe's Cases*, p. 401; where it is said to be wrongly reported in *Atkyns*; and I do not perceive that the case has been, any where else, explained, commented on, or even cited. I think, therefore, that the question is still open, whether a judgment against the principal is conclusive evidence against the sureties, or not.

The general rule is, that verdicts and judgments bind *conclusively*, parties and privies; because, privies in blood, in estate, and in law, claim under the person against whom the judgment is rendered; and they, claiming his rights, are, of course, bound as he is. But, as to all others, they are not conclusively binding; because, it is unjust to bind a party by any proceeding, in which he had no opportunity of making a defence, of offering evidence, of cross-examining witnesses, or of appealing, if he was dissatisfied with the judgment; and this is called by the Court, in *Burke v. Granberry*, "a golden rule." *Gilm. Rep.* 25. Sureties, and joint contractors, do not claim, to any purpose, under their principal, or under each other. There are cases, in which those who are not parties to the suit, and do not claim under either of the parties, may be bound by the judgment, as in the cases of contracts of indemnity, and in the nature of contracts of indemnity, and in those cases in which a person, although not in form a party to the suit, is bound to assist in the prosecution or defence, and either does so in fact, or, having notice of the pendency of the suit, fails to do so. But, these cases do not come within the principle or reason of the general rule

aforesaid; and, the case of principal and surety, so far as it relates to the effect, upon the sureties, of a judgment against the principal, does not come within the reason of this latter class of cases, but within the general rule. In 10 *Vin. Abr.* 464, it is said: "If A. and B. be bound in a recognizance that B. shall keep the peace, and in a *scire facias* against B. it is found that he broke the peace, in another *scire facias* against A. he shall not be estopped by the first trial." So, if A. binds himself to pay for goods sold and delivered to B., the admission of B. as to the amount of the goods sold and delivered to him, is not even admissible evidence, in a suit against A. 5 *Esp. Cases*, 26; and so, I presume, if A. and B. were to covenant, that if B. should pay for goods furnished to him, and if he did not, that A. would; the admissions of B. as to the amount of the goods sold to him, would be inadmissible as evidence against A.; and, a judgment against B. founded on his admissions, ought to be no more evidence against A. than B's admission would be. The decisions of this Court, that the admissions of one partner, after the dissolution of the partnership, are no evidence against the other partners, whether the partners be defendants, as in *Shelton v. Cocke, Crawford & Co.*, 3 *Munf.* 191, or plaintiffs, as in *Rootes v. Welford & Co.*, 4 *Munf.* 215, seem to me to have a strong bearing upon the question in this cause. During the continuance of the partnership, each partner may bind the firm by *parol*, as any man may bind himself; and, although this power is lost by a dissolution of the partnership, yet, all the partners, after dissolution, are subject to joint obligations as to their partnership transactions, as completely as principal and sureties, or any other joint contractors are, by deed.

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By the rule of the civil law, a judgment against the principal, whilst in force, is conclusive against his sureties. But, this is because the sureties are permitted to controvert the judgment against the principal, even if it be a judgment of a Court of final resort. No such privilege is given to sureties by our law.

1824. Nor can the creditor complain of the burthen of proving
 February. his case repeatedly, in different suits, against the principal
 Munford, and his sureties; for, generally he can, if he will, convene
 &c. them all in one suit, and so avoid that inconvenience. In
 v. the case at bar, the Overseers of the Poor might have pro-
 Overseers of Poor, &c. ceeded against the Sheriff, and his sureties, jointly, in the
 first instance. In those cases where, from any cause, a
 creditor cannot convene, in one suit, the principal and sure-
 ties, it is better that he shall suffer the inconvenience of
 proving his case in such suit, than that the sureties should
 be conclusively bound by a proceeding, in which they
 could not be heard in their defence.

Upon the whole, I do not think that any judgment
 against *Munford* only, can be conclusive evidence against
 his sureties, as to the fact of his being appointed to collect
 the poor-rates. From the finding of the jury, I should
 infer, that proof was given by the sureties, that, in fact,
Munford was not appointed by the Overseers of the Poor
 to collect the poor-rates, and that the judgment against
 him, proceeded upon the supposition, that he, as Sheriff,
 was *ex officio* bound to collect the poor-rates, without such
 appointment. Whether this were so, or not, is immaterial
 to the question, whether the sureties were bound conclu-
 sively by the judgment. For, such may have been the
 fact; and the possibility of such a state of things demon-
 strates the impropriety of holding the sureties conclusively
 bound by a judgment against the principal, which they
 had no opportunity to resist or impeach. In this case, the
 principal and his sureties were sued and pleaded, jointly;
 and, it may be supposed, that, as the former judgment
 was conclusive evidence against *Munford*, it might, upon
 the issue in this cause, be given in evidence against him;
 and, as it bound him, so it must bind them, or, at least,
 that upon such evidence, a verdict and judgment should
 be given against him. To this, it is to be observed, that
 the plaintiffs, alledging a joint responsibility, must prove
 the case which they alledge, or fail in their action *in toto*:

that the sureties, having a right to repel this evidence by any other in their power, and, having done so effectually, thereby negatived the allegation of a joint responsibility, and so destroyed the plaintiffs' action, as to *Munford*, as well as themselves; although, if *Munford* had been sued alone, he could not have resisted the evidence offered by the plaintiffs. *Munford* is entitled to be discharged in this action, not because he is not liable to the plaintiffs' demand, but because he is not liable, as they alledge, jointly with others. It is not intended by any thing said here, to decide upon the propriety of giving in evidence against the sureties, any thing which may be given in evidence against the principal. That might depend upon circumstances. But, when admissible, it must be taken with this limitation; that, whether such evidence be conclusive against the principal, or not, it is only *prima facie* evidence against them, and may be contradicted, repelled, or avoided; unless it be conclusive upon them, for some other reason, than that it is conclusive upon him.

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The judgment should be reversed, and final judgment rendered for the appellants.

Judge COALTER.

I am of opinion, after a careful examination of all the acts of Assembly on the subject, that the Sheriff was bound to collect the poor-rates, if appointed to do so by the Overseers of the Poor; and, that his sureties in the bond sued on in this case, would be responsible for such collection.

I am also of opinion, that although by the law as it now stands, it is made the official duty of the Sheriff to collect those rates, and his sureties are, therefore, responsible therefor; yet, at the time this bond was given, they were not so responsible, unless he was appointed collector by the Overseers, and that, consequently, to charge them, it must appear that he was so appointed.

1824. I am further of opinion, that as well on general principles, as because it might not be competent for the Sheriff, if in fact he did collect the poor-rates, to deny his appointment, the judgment against him for those rates is not conclusive as to his sureties, that he was so appointed.

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I say this judgment is not conclusive on general principles. *Peake on Evidence*, vol. 1, p. 26, says, "a judgment of a debt is conclusive evidence of it against the parties; but, as against third persons, a verdict, in a civil case, is no evidence whatever; for, the first principles of natural justice require that a man should be heard, before his cause is decided; and, if he were bound and in the least degree prejudiced by a verdict, when he had no opportunity to cross-examine the witnesses, it would, in effect, be overturning the most salutary rule of jurisprudence." This point too, was, as I consider, decided in this Court in *Buford v. Buford*, 4 Munf. 243. The Court, there, did not overrule the objection taken; but, admitting its correctness, did not think that the opinion of the Court below went as far as was contended for.

But, if a Sheriff acts as such for the second year, without giving a new bond, or taking a new oath of office, it will not lie in his mouth, nor, as I suppose, in that of his deputy acting under him, to say he was not Sheriff, although the sureties will not be bound for his acts in the second year. I apprehend, that it is not competent for the Sheriff or deputy, acting as such *de facto*, to say they are not such *de jure*. *Lane v. Harrison*, 6 Munf. 573.

It would be strange, then, in this case, to say, that though the Sheriff may have been estopped to say that he was not collector, his sureties should be concluded by that judgment.

The case, then, must be considered not only as one in which there is a total absence of such proof, except what may be *prima facie* inferred from the judgment aforesaid; but, in which it was proved that no such appointment was

made, and consequently the judgment must be reversed, and entered for the appellants.

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Judge CABELL.

I entirely concur in the opinions of the other Judges, and also, in the resolution to reverse the judgment, and to enter final judgment for the appellants. *

* Judge BROOKS, absent.

NORRIS v. CRUMMEY and others.

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If a Sheriff, before a judgment is obtained, makes an arrangement with the defendant, by which he (the Sheriff) undertakes, for a valuable consideration, to pay the debt to the plaintiff, when the judgment is rendered, and execution sued out, and returns, "ready to render;" he will be considered as having "levied the debt," within the meaning of the statute; and, if he fails to pay the plaintiff, the sureties in his official bond will be liable for his default, unless the plaintiff was privy to such arrangement.

An indulgence granted by a creditor to the principal debtor, will not discharge the sureties of such debtor, unless the creditor has bound himself, in law or equity, not to pursue his remedy against the principal, for any length of time. *Quere*, whether this equity of the sureties applies at all to the case of a Sheriff's bond, or other official bond?

This was an appeal from the Chancery Court of Winchester. The following opinions of the Judges of this Court, will present a complete view of the circumstances of the case, and the principles involved in it.

Wickham, for the appellants.

Johnson, for the appellees.

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February 19. The Judges delivered their opinions.

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Judge GREEN.

On the 26th day of April, 1819, *Brown*, who resided in Rockingham, (and probably in the district of *Ragan*, a deputy Sheriff of that county,) bargained with the latter to assign to him certain bonds at a discount, and to give him a horse, and to pay him \$800 in money; in consideration of which, *Ragan* was to satisfy an execution expected to issue, against *Brown*, and his sureties, *Bird* and *Deary*, from the Superior Court of Shenandoah, upon a suit then depending against them, on behalf of the appellant. It was also agreed, that *Ragan* should have all the time for the payment of the debt, which could be procured by *Brown's* giving and forfeiting a forthcoming bond. *Brown* accordingly, on the same day, assigned the bonds, delivered the horse, and paid the money to *Ragan*, according to their agreement.

A judgment was rendered in the suit of *Norris v. Brown et al.*, on the 26th of May, 1819, one month after this transaction between *Brown* and *Ragan*; upon which, an execution issued, which came to the hands of *Ragan*, a forthcoming bond was taken and returned by *Hicks*, (probably a sub-deputy Sheriff in the employment of *Ragan*.) This bond was defective, and was quashed at the instance of *Norris*. On the 2d of November, 1819, a *ca. sa.* issued upon the judgment, directed by order of the plaintiff's counsel, to the Sheriff of Rockingham, which *Hoffman*, a deputy Sheriff of Shenandoah, surreptitiously got possession of, in the expectation of finding *Brown* and *Bird*, who resided in Rockingham, at *Bushong's* sale, in that county, which was to take place in a few days; and to enable him to levy the execution upon all the defendants, he prevailed upon *Deary*, who lived in Frederick, to attend at *Bushong's* sale, and to procure a prison-bonds bond to be executed; but, not finding *Brown* and *Bird*,

or either of them, at the sale, and not daring to levy the execution on *Deary* alone, in consequence of the manner in which he had procured the execution, the prison-bonds bond was never delivered to him, nor did he arrest *Deary*. But, not to be wholly disappointed in securing the profit which he expected from levying the execution, he induced *Deary* to believe that he had rendered him an essential service, in the management of this execution; in consideration whereof, *Deary* executed to him his bond for \$ 50, a sum nearly equivalent to what he would have received, if he had actually levied the execution, and the money had been paid to the plaintiff; and, upon this bond, he instituted a suit against *Deary*.

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The attorney of *Norris*, having reclaimed the execution from the hands of *Hoffman*, sent it to *Ragan* to be executed; who, thereupon, executed himself a forthcoming bond, which has also the names of *Brown* and *Bird* to it. But, how *Brown's* name came to be signed to this bond, does not appear; he seems to have been, at the date of this bond, in Kentucky. This bond was presented by *Hicks*, (who, as aforesaid, was probably a sub-deputy Sheriff in the employment of *Ragan*,) to *John Ragan*, the brother of the deputy Sheriff, who also executed it. This bond bears date the 23d of November, 1819, and the appointed day of sale was the 31st of December, 1819. The execution and bond were returned by *James M. Bush*, another deputy Sheriff of Rockingham. But, whether the execution was put into his hands before or after the return-day, does not appear. It is probable, that he had no agency in levying or managing the execution, further than to endorse the return, at the request of *Ragan*; and that, in fact, the execution was never executed. Upon this bond, execution was awarded on the 22d day of May, 1820, and issued on the 30th of May, 1820, and sent by the plaintiff's attorney to the said *James M. Bush* to be levied, with directions to levy on the property of the *Ragans*, and not on *Brown's* for the present; the attorney having,

1824. about that time for the first time, heard it intimated that
February. *Ragan* had, as deputy Sheriff, given his receipt for the
Norris amount of the execution to *Brown*, on or before the day
v. appointed for the sale of the property by the forthcoming
Crummey, &c. bond. This execution was levied according to the attor-
ney's instructions. Early in July, the attorney ascertained
the existence of the receipt from *Ragan* to *Brown*. This bears date December 31st, 1819, but obviously was
given at a later period; for, it expressly states, that the
forthcoming bond was not present;—states the amount of
the debt conjecturally and erroneously; and even mistakes
the name of the creditor. The attorney having received
this information, and read the receipt, called upon *Ragan*
for the money, who said, that he had not the money—
promised to pay \$2,000 on the first of October—and beg-
ged indulgence; which the attorney refused to give, and
told him to get the execution from *Crouse*, (a deputy Sher-
riff who had received the execution from *Bush*,) and by a
proper return thereof, shew a disposition to do what he
was in duty bound to do. The attorney, meeting with
Crouse, and not knowing that the execution was levied,
authorised him to deliver the execution to *Ragan*. This
is the statement of the attorney; but, *Crouse* testifies, that
the attorney knew that the execution was levied, and posi-
tively directed him to deliver the execution to *Ragan*,
which he did in the presence of the attorney. The pro-
position of *Ragan*, as to indulgence, does not seem to have
been positively rejected by the attorney, *Allen*; but, he
refused to give any indulgence, without the assent of his
client. On the 20th of July, 1820, he saw *Norris*, and
with his assent, wrote to *Ragan* to this effect: that *Nor-
ris* was willing to assent to *Ragan's* proposal, “which is,
that you take the execution from *Crouse*, and return there-
on, money made and ready to render, in your official
character of Sheriff; that you are to pay \$2,000, or the
half of the whole amount, on the 1st of October next, or
sooner, if received; and for the balance, to be indulged

until the 1st of July, 1821, if not paid before; so that, should there be any necessity for noticing the high Sheriff, in order to prevent you or his securities from taking *any advantage of our indulgence*, at the October or May term; yet, in no event is an execution to issue on the judgment on the notice, until after the 1st of June, 1821.”

“The circumstance of the notice, should it be deemed necessary, *is only to be viewed as a step of precaution*, and not as a trap; for, if plighted words can bind, no execution shall issue ere the 1st of June, 1821.” “Get the execution from *Crouse*, and make the return.” *Ragan* accordingly made the return; and on the 24th of May, 1821, a judgment was rendered on that return against *Ragan* and his sureties.

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It is not necessary to advert, particularly, to the circumstances under which this judgment was rendered, since, if the facts of the case would have enabled the sureties to defend themselves at law, they are, notwithstanding they made no defence at law, clearly entitled to relief in equity, because they were not informed of the facts of the case in time to make their defence at law.

Upon this case, the Court of Chancery over-ruled a motion to dissolve an injunction which had been awarded upon the exhibition of the bill, upon the ground that *Ragan* was not liable as deputy Sheriff, to the payment of the amount of the execution to the plaintiff, he having made no money by virtue of the execution, which he returned “money made and ready to render,” or of any other execution in the case; and that the return was false, and could not bind the sureties, it being made in consequence of a fraudulent combination between *Ragan* and the attorney for the plaintiff, to charge the sureties of *Ragan* with the debt. And, it is urged by the counsel of the appellees, that even if the return were true, the stipulation, on the part of the plaintiff, to give *Ragan* time for the payment of the money, would, in equity, discharge the sureties.

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I throw out of the case, all the matter which is doubtful, and consider it as if *Hicks* was not a sub-deputy in the employment of *Ragan*; which will render it unnecessary to enquire, whether *Ragan* and his sureties were responsible for *Hicks's* acts, and whether they would not be responsible for the debt, in consequence of his taking a faulty forthcoming bond, and how such liability might be effected by the subsequent transactions; and, as if the attorney for *Norris* had known that the last execution was levied on the property of the two *Ragans*, and had, notwithstanding, insisted on *Crouse's* surrendering the execution to *Ragan*; and, as if the execution, upon which the last forthcoming bond was taken, had been levied by *Bush*, the forthcoming bond taken by him, and the bond and execution remained in his hands from the date of the forthcoming bond, until they were returned; and, that the receipt dated December 31, 1819, was executed after the return-day of the execution, to wit: the 31st day of January, 1821.

In this view of the case, it is clear, that no money was made by *Ragan*, in his office of Sheriff, upon the first execution, which was quashed, or upon the second, upon which the forthcoming bond was given and forfeited, if the receipt, bearing date the 31st of December, 1819, was really executed by him after the return-day of the execution. For, the receipt of the consideration for which he stipulated to pay *Norris's* debt, imposed no obligation on him, in his official character, but only individually; and, in case of his failure to perform his contract, he was individually bound; and his sureties, for the due execution of his office of Sheriff, could not, in that case, be responsible either to *Brown*, or the plaintiff, until *Ragan* did some official act to bind himself, in respect to the funds placed in his hands by *Brown*, to account for them as Sheriff. He could not be bound as such, nor could his sureties, at the time he executed the receipt; there being no execution in the hands of any Sheriff of Rockingham, which gave

authority to any such to receive the money, he could do no act which could bind him officially, unless to return the execution, "ready to satisfy." The effect of such a return will be considered hereafter.

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It is true, that a false return, produced by a fraudulent combination between the plaintiff and the deputy Sheriff, ought not to charge the high Sheriff, or the sureties of the deputy. But, if a deputy Sheriff should, without fraud on the part of the plaintiff, but with fraudulent views of his own, make a return which would preclude the plaintiff from taking out another execution, he would violate the condition of his bond, which provides, that "he shall, in all things, truly and faithfully execute and perform the said office of Sheriff," and his sureties would be responsible. One of the duties of his office is, to make *true returns*; and if, in such case, the sureties were not responsible, then the plaintiff might lose his debt, by the default of the Sheriff, without remedy. It is, therefore, I presume, that the act of Assembly has made the Sheriff and his sureties liable, not because of the fact of his having made the money upon an execution, but because of his return that he has made it. Upon such a return, the high Sheriff would be bound to the creditor; for, it would be, in effect, his own return, by his deputy, which he could not controvert. He could not alledge the falsehood of the return, or the fraud of his deputy, in his defence, since that very fraud and falsehood had the effect of barring the remedy of the creditor against his original debtor. And if the high Sheriff be liable for any default of his deputy, the sureties are bound by the terms of their obligation to indemnify him. If, therefore, *Ragan* had made the return in question, without the knowledge or concurrence of the plaintiff or his attorney (or, with their concurrence, and at their instance, if they believed it to be true, and were chargeable with no fraud,) for some fraudulent purpose of his own, even if it were confessedly false; it would have prevented the plaintiff from taking out any other ex-

1824. execution on his judgment; and his sureties would have been
February. bound for the debt to the high Sheriff, if the plaintiff
 Norris thought proper to resort to him, or otherwise, by force of
v. the provisions of the act of Assembly, to the plaintiff; un-
Crummey, less, indeed, it could be said, that *Ragan* was incompe-
&c. tent to do any official act, in relation to an execution to
 which he was a party defendant; and that, therefore, such
 a return by him was merely void, and might and ought,
 for that cause, to have been quashed, so as to enable the
 plaintiff to take out another execution. I do not perceive
 any such incompetency. If the execution had come to
 the hands of the high Sheriff, nothing would have forbid-
 den him to deliver it to *Ragan*, to be executed. There
 were other parties, out of whom the money might have
 been made, and ought to have been made, in justice, if
Ragan had been, in fact, only a surety. At all events,
 the plaintiff could not complain that the high Sheriff, by
 his deputy, upon such an execution, had returned that the
 money was made. There would be no impropriety in the
 plaintiff's delivering the execution to *Ragan* in the first
 instance; and, I have no doubt that this is the daily prac-
 tice throughout the country. I can see no difference, as to
 the question of *Ragan's* competency to act officially in re-
 lation to the execution, whether it was delivered to him by
 the plaintiff, or by the high Sheriff. Whatever act he did
 in relation to the execution, was, in point of law, the act
 of his principal, and not his act.

Before we come to the enquiry, whether *Norris* or his
 counsel are chargeable with any fraud in this transaction;
 it is proper to ascertain whether, in fact, the return in ques-
 tion was true, or false and fraudulent.

As soon as *Brown* put funds in *Ragan's* hands, in con-
 sideration of which *Ragan* promised to discharge *Norris's*
 judgment, he became individually *Brown's* debtor for that
 sum; and neither this, nor his subsequent failure to per-
 form his contract, could have affected his sureties. But,
 as soon as he elected, acting in his office of Sheriff, to ap-

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ply his individual debt to *Brown*, in satisfaction of the execution in his hands, he performed his contract with *Brown*, and thenceforth was a debtor, as Sheriff, to *Norris*. If a Sheriff were to purchase property of a person against whom he had a *fi. fa.* in his hands, to the amount of the execution, and agree to apply it in satisfaction of the execution, and did so, by returning the fact; or were to accept an order on a merchant, payable after the return-day, not having levied the execution, and to return "ready to render," or to accept any thing else in satisfaction, and made a like return; although, in these cases, he would not literally have "made money" on the execution, yet he would, in the language of the statute, have "levied the debt," and he and his sureties would be responsible; and if so, then the Sheriff, being indebted to the defendant on any account, might take his own debt in satisfaction of the execution, return the fact, and bind himself officially, and, consequently, his sureties. The return was then true. The moment he assented to apply his debt to *Brown*, (having the execution in his hands as Sheriff,) in satisfaction of the execution, he "levied the debt," and his return is conclusive proof of his assent. Nor does it appear to me, that this return was fraudulent. He had actually received funds to the full amount of the debt, which he was bound in conscience to apply to its discharge. The sureties could be no more affected by this return, than if he had received those funds whilst the execution was in full force and in his hands, and applied them as he did, to his own use; and no more than if *Brown* had deposited the full amount in money in his hands, before the execution issued, and after execution issued, he had, by *Brown's* order, applied the money to the satisfaction of the execution, and afterwards applied it to his own use. His fraud consisted, as against the plaintiff, in entering into the original arrangement with *Brown*, with intent to appropriate the funds to his own use; and as against the plaintiff and

1824. his sureties, in misapplying the funds, and not in making
February. the return.

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But, if the return were false and fraudulent on the part of *Ragan*, was *Norris* or his counsel privy to the falsehood, or did they participate in the fraud? *Norris* knew nothing of the transaction but from the information of his attorney, who assured him that the Sheriff and his sureties were already answerable for the debt; and in giving this assurance, the attorney acted conscientiously. He had delivered the execution of the 2d of November to *Ragan*. He had seen *Ragan's* receipt for the amount of the execution, dated on the day the forthcoming bond would have been forfeited, if the money had not been paid, or the property produced. He might well have supposed, that the money, or some equivalent, was then duly paid, to a Sheriff authorised to receive it, although the execution was returned, and the forthcoming bond purports to have been taken, by *Bush*. For, that might well have been done, and the execution been in the hands of *Ragan*, until the return-day; and, although the receipt states, that the forthcoming bond was not present when the receipt was given; yet, that might have happened, and the bond and execution might have been at *Ragan's* house, or in the hands of his sub-deputy. This impression on *Allen's* mind, was fortified by *Ryan's* admission, that he had received the money officially, and was bound for it as Sheriff. If all this were false, it was the falsehood of *Ragan*; and if a deputy Sheriff, by false representations, induces a plaintiff to consent to a false return, which, if made without this concurrence of the latter, would bind the sureties of the former, the sureties cannot avail themselves of such assent, to discharge themselves from liability. If the fact had been as *Ragan* induced *Allen* to believe it was, and *Ragan* had duly received the money when authorised to do so, as Sheriff, *Ragan's* sureties would have been bound, and, that even if the return on the subsequent

execution had been false, because no money was made on that execution. For, a Court of Equity would not restrain an execution on the judgment founded on that return; since the sureties, being bound otherwise than by that return, must have done equity before they could ask it. It is, therefore, that a Court of Equity permits even a judgment obtained by fraud, to stand, as a security for any sum justly due. The time given to *Ragan*, on condition that he would make the return, does not indicate that the plaintiff or his counsel were conscious of doing any wrong to the sureties. They believed, and were induced to think so by *Ragan*, that they were already bound. But, without the return, that liability, if it existed, could only be enforced by a tedious action; whereas, the return being made, a summary remedy might be had. It was for the sake of having this summary remedy, and not for that of charging the sureties otherwise than they were already chargeable, that this indulgence was given to *Ragan*. This object was perfectly fair and honest; for, if *Ragan* had received the money as Sheriff, he was bound, in law and justice, to make the return, and to give the summary remedy. The plaintiff only sought, what he believed that, by law and equity he was justly entitled to.

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I, therefore, consider the return to be neither false nor fraudulent; that if it were both, it would bind the sureties, unless the plaintiff or his attorney were privy to the falsehood, or participated in the fraud; that if the return was false and fraudulent, they were not privy to the one, nor participated in the other; and, that the injunction should be dissolved, unless the time given to the deputy Sheriff, for the payment of the money, absolved his sureties.

The long settled rule of Courts of Equity, and which has been adopted to its full extent in the Courts of Law, in England, is, that if a creditor, by agreement or any other act, precludes himself at law from proceeding against the principal, after the debt is due, for a moment; or, if the

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agreement be such as would induce a Court of Equity to prohibit the creditor's proceeding at law; the surety is discharged, because the creditor thereby inflicts an injury on the surety, and deprives him of the means of relieving himself, either by paying the debt and immediately proceeding against his principal, (for, in that case, he would be substituted in equity to the rights of the creditor; and, if the creditor had deprived himself by any act or agreement, of the right of proceeding immediately against the principal, this right of the surety would be impaired or frustrated;) or, by filing his bill *quia timet*, to compel the debtor to pay to the creditor, for the exoneration of the surety; in which case, if the creditor could not himself, in consequence of his own act or agreement, compel the principal to pay, neither could the surety, who, in such case, asserts the rights of the creditor for his own safety. And, in this case also, the rights of the surety would be impaired by the act of the creditor. But, if the act or agreement of the creditor is such, that he might, notwithstanding, proceed immediately against the principal, if required in writing by the surety, as the act of Assembly authorises; or might, upon the payment of the debt by the surety, substitute him to the right of proceeding immediately against the principal; or the surety might, notwithstanding such act or agreement, proceed without impediment or delay, by his bill *quia timet*; then no injury has been done to the surety by the creditor, and there is no possible reason for absolving him. As judgment with a stay of execution entered of record, prevents the plaintiff at law from proceeding immediately, and absolves the surety, and an agreement to give time founded on valuable consideration, such as giving a new security, would be obligatory, and would be enforced in equity; such an agreement would also discharge the surety. But, an agreement without consideration, to give time to the principal, would be a nude pact, and could not be enforced at law or in equity, and the creditor could proceed immediately against the debtor, notwithstanding

such agreement, and in that case, none of the remedies of the surety would be impaired, and consequently, he would not be discharged. So, if the creditor were to agree to give time to the principal, upon valuable consideration, and at the same time it were agreed, that he might proceed immediately against the principal, if required by the surety; in that case, the rights and remedies of the surety would not be impaired, nor would he be absolved.

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That the true ground upon which sureties are relieved in such cases is, that the creditor has impaired the remedies of the surety, by his act or agreement, appears decisively, from all the cases in England and Virginia, upon that subject; notwithstanding the loose and indefinite expressions sometimes used. Indeed, if this be not the true criterion, I can perceive none, but the arbitrary will of the Court in deciding each particular case.

Thus, in *Nisbet v. Smith*, 2 Bro. C. C. 579, the surety called on the creditor to sue the principal, which he did, and took a confession of judgment, with a stay of execution for three years. This agreement was endorsed on the power of attorney to confess judgment. The original contract was merged in the judgment; so that, if the surety had paid the debt to the creditor, and he had ceded to the surety his rights, the latter could not have proceeded against the principal, until after three years; and so, if he had filed his bill *quia timet*, the principal could not have been compelled to pay, until after three years. The remedies, therefore, of the surety, were deeply impaired by this act of the creditor.

In *Rees v. Barrington*, 2 Ves. jun. 540, the creditor took new notes of the principal, giving further time for payment than that stipulated by the bond. The Chancellor said: "The surety has a right, the day after the bond is due, to come here, and insist upon its being put in suit. The obligee had suspended that till the time contained in the notes runs out. Therefore, *he has disabled himself* to do that equity to the surety, which he has a right to demand."

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In *Samuel v. Howarth*, 3 Merivale, 272, there was a contract to guarantee the payment for goods to be purchased by another, upon the usual credit. A note was given by the principal for the payment of the money, at the expiration of the credit; and, when due, was given up by the creditor, and another taken, payable at a further day. The guarantor was held to be discharged. The Chancellor, referring to the general rule, gave this reason for it: "that, in fact, the surety cannot have the *same remedy* against the principal, that he would have had under the original contract."

Skip v. Huey, &c. 3 Atk. 91, does not seem to come under this rule; for, there the principal professedly applied to the creditor, to give up the bond, and take new securities for the debt, for the purpose of discharging the surety; which was done. Some of the new securities proving of no value, the Court refused to subject the surety, the creditor being plaintiff.

In *Peel v. Tatlock*, 1 Bos. & Pull. 422, the whole Court concurred in refusing relief to the surety; and BULLER, Justice, said: "I do not see how the responsibility of the surety could be given up, since no favor shewn by the creditor to the principal, nor any thing done between them, which did not *create an injury to the surety*, could discharge the latter."

In *ex parte Gifford*, 6 Ves. 809, and *Boulton v. Stubbbs*, 18 Ves. 20, it is admitted by the Chancellor, that if the creditor giving time, reserves his remedies against the principal or sureties, the latter are not discharged by giving time to the principal; for, in the latter case, it is equivalent to an agreement that the creditor may proceed at pleasure against the sureties, and thus throw them on the principal, notwithstanding the conditional indulgence given to him.

In *Moore v. Bowmaker*, 6 Taunton, 379, in an action of replevin; bond and security having been given by the plaintiff, for the return of the goods, the parties agreed to

an order of reference, and that no proceedings should be had in the replevin cause, pending the reference; relief was denied to the surety in the replevin bond; and GRASS, Chief Justice, said, "that the principles upon which Courts of Equity had relieved sureties, were adopted in the Courts of Law, and applied to the case of bail. For, when the plaintiff has given time to the principal, the bail are put in a new situation: for, as the plaintiff could not, during that time, take the principal, so neither can the bail, whose right grows out of the plaintiff's. But, what is the present case? Sureties in replevin cannot, at any time, take the goods of the plaintiff, and restore them to the avowant."

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These principles have been recognized here in *Crough-ton v. Duval*, 3 Call, 69. The surety sought relief, upon the ground, that the creditor had been requested by him to sue the principal, which he had refused to do. The Court denied the relief, whilst they recognized the authority of *Rees v. Barrington*, and *Nisbet v. Smith*.

In *Ward v. Johnson*, 6 Munf. 6, the majority of the Court inclined to think that the surety was discharged in equity; because, the act of the creditor "had deprived him of his remedy, by bill *quia timet*."

In *Hill v. Bull*, Gilm. Rep. 149, the surety was relieved, because the act of the creditor had suspended the resort of the surety to his bill *quia timet*.

In *Bennet v. Maule*, Gilm. Rep. 328, Judge ROANE considered the surety as discharged, because the creditor had "opposed an impediment to his obtaining relief, by means of a bill *quia timet*;" and, in that case, Judge COALTER said, (in which Judge CABELL concurred,) the only principle on which a surety can get relief, agreeable to the case made in the bill, is, that he has been deprived of his bill *quia timet*, by a contract between the creditor and principal, by which the creditor has tied his hands;" and, considering that the surety might, in that case, have relieved himself by such a bill, denied relief.

1824. In examining these cases, with a view to ascertain what
 February. is the settled principle upon this subject, at law, and in
 equity, it is not material to enquire, whether, in some in-
 Norris stances, the rule may not have been applied to cases, to
 v Crummev, which it was not justly applicable. It is sufficient to
 &c. know, that the sole ground of relief to sureties, in such
 cases, is settled, and avowed to be, that they have been
 deprived, by the act of the creditor, of a legal or equitable
 remedy for relieving themselves; or, that such remedy has
 been impaired by his act.

Our statute, which authorises sureties to call upon the
 creditor in writing, to proceed against the principal, and
 discharges the surety in case of the failure of the creditor
 to do so, excepts the cases of sureties to bonds, with colla-
 teral conditions, and the bonds of guardians, executors,
 administrators, and public officers. It may be said, that
 this exception does not affect the common law remedies of
 the surety; and that, in the cases excepted by the statute,
 a surety might still avail himself of his bill *quia timet*.
 This may be so; yet, it may be seriously questioned, whe-
 ther a bill *quia timet* would lie in some cases. If it would,
 the consequences would be very extensive; one, for in-
 stance, that if a creditor took a judgment, with stay of
 execution, against an executor, his sureties would thereby
 be absolved; unless the remedies provided for sureties in
 that case, by the statute, obviated that effect.

It might also be a serious question in this case, whether,
 as between *Ragan* and *Norris*, a Court of Equity would
 have enforced the agreement between them, if the conse-
 quence would be to discharge the sureties; or, even with-
 out regard to that consequence; and whether, in fact, the
 remedy of *Norris* was delayed or suspended. And, it
 might be another question, whether *Norris* did not reserve
 his remedies unimpaired, against the high Sheriff, although
 the consequence of pursuing that remedy might be, to sub-
 ject *Ragan* to be proceeded against by the high Sheriff,
 before the time of the stipulated indulgence had expired.

It is not necessary to pursue these enquiries; since, I think, there is another view of the case which is decisive. 1824.
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In general, the high Sheriff alone, and not the deputy, is responsible to persons injured by the official conduct of the latter. The deputy gives bond and security to the high Sheriff, for the performance of his duties, and for indemnifying his principal. Upon this bond, the party injured by the official misconduct of the deputy, has no remedy, unless expressly given by statute; and the remedy is then confined to the form prescribed by the statute. A remedy is so given in the case of a deputy Sheriff, returning that he has levied the debt, and in no other case. That remedy is by motion, and is given on the principle of substitution to the rights of the high Sheriff, arising out of the deputy's bond to him. But, although this remedy is given, it does not take away the original remedy by action or motion against the high Sheriff. The party, therefore, retains an election to proceed against the one or the other, by motion. This is the construction given to the act of Assembly by the General Court, in *Hogan v. Cottle, &c.* (November, 1820,) and by this, in a case from *Culpeper*, not reported, and is the just construction. The words of the statute are, "if any Sheriff, under Sheriff, or other officer, shall make return, &c." A return made by a deputy is the return of his principal, the Sheriff, and is made in his name; and such a return by the deputy, subjects his principal to the provisions of this statute. The 34th section of the act of 1819, provides that, "when any deputy sheriff *now* in office, or who may *hereafter* come into office, hath been, or shall be, found in arrears for any money, tobacco, or other thing received, or which ought to be received, by such deputy, by virtue of his office, and for which the principal, &c. *is* or *may be* chargeable, and shall not *immediately* pay or deliver the same to the person, &c. entitled thereto, the Sheriff may obtain such judgment, on motion, against the deputy, and his securities, as the principal, &c. might, by mo-

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1824. tion, be liable to, on account of such arrears, &c., and
 February. have execution for the same; unless the person entitled
 Norris had already recovered against the deputy, or might *there-*
 v. *after*, and before the motion of the high Sheriff, recover
 Crumney, a judgment against the deputy.”
 &c.

I have not used the precise words, but have stated the substance of the statute. For, the words “may be” do not refer to the possibility or right of the party to recover judgment on motion, against the deputy, before the motion of the high Sheriff, but to an actual judgment *thereafter* obtained, before the motion of the high Sheriff. In the case of a deputy Sheriff returning on an execution “money made,” and not coming within the exception above stated, nothing could excuse him upon the motion of the high Sheriff, but the *immediate* payment of the money to the party entitled. It would be in vain for him to say, either that he had not made the money, for his official return would preclude such an allegation, or that the plaintiff had agreed to give time for the payment of the money. He would be answered, that the plaintiff could not deprive the high Sheriff, by any act or agreement of his, of his legal right to call for, and enforce the payment to him of all money made by his deputies in their official character; that, he being bound ultimately to pay, if the deputy did not, had an immediate right to secure himself, by taking the fund into his own hands, and either pay it immediately, or claim the stipulated indulgence, at his pleasure; and that, in effect, the agreement to give time was an agreement to give time to the high Sheriff.

If, then, the agreement in question were such as would, in an ordinary case of principal and surety, discharge the latter, yet, in this case, it would not, since it did not defeat or impair any remedy to which the sureties might have resorted for their relief. If the sureties had, immediately after the return, filed their bill *quia timet* against *Ragan* and *Norris*, *Norris* could not have been compelled to proceed against *Ragan*; for, the law had given him an

election to proceed, at his pleasure, against the high Sheriff or his deputy; and this election could not be taken from him, at the instance of the sureties; nor could he have been compelled to proceed against the high Sheriff, unless such a proceeding had been necessary for, or in some degree contributed to the safety or indemnification of the sureties. It was not necessary, nor could it have contributed to that end; for, the high Sheriff could have proceeded against *Ragan*, as well before as after he was proceeded against by *Norris*. And, if the sureties could have called upon the high Sheriff by bill of *quia timet*, to proceed against *Ragan* after judgment against the high Sheriff, they could do so as effectually before such judgment. So that it was of no consequence to them, whether *Norris* proceeded against the high Sheriff or not. Notwithstanding this agreement, they might have had as effectual relief by a bill *quia timet* against the high Sheriff and *Ragan*, as if the agreement had not been made; and, if they had chosen to pay the money to the plaintiff or the high Sheriff, upon the return, they could, by substitution to the rights of the high Sheriff, have been as effectually relieved against *Ragan*, as if the agreement had not been made. For, as he could not avail himself of the stipulated indulgence, as against the high Sheriff, neither could he against his sureties, asserting the rights of the high Sheriff, and substituted to them.

One other enquiry remains. It is insisted, that the plaintiff, by releasing the property of *John* and *Daniel Ragan*, taken in execution, did an injury to the sureties of the latter, by surrendering one of the securities which the plaintiff held for his debt; and that, upon the principle that the release by a creditor of any other security which operated for the benefit of the sureties, they are thereby put in a worse condition, and are therefore discharged. The sureties had not, before the release of this property, any interest in the question, whether the property should be released or not. They were not, according to their

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1824. own allegations, *then* responsible as sureties for *Norris's*
February. debt. If they had, after the execution was levied and be-
 ~~~~~  
 Norris fore the property was released, filed their bill *quia timet*  
 v. to enforce the sale for their indemnity, they could not  
 Crummev, have succeeded, because they were not then in any way  
 &c. liable for the debt. It was by the act of *Ragan*, subse-  
 quent to the release of the property, or cotemporaneous  
 with it, electing, (by making the return which he did,)  
 officially to hold his debt to *Brown* as a satisfaction of the  
 execution, that their liability arose. They have no more  
 interest in that transaction, than they had in the question,  
 whether *Daily* was arrested under the execution, and dis-  
 charged by the plaintiff. This, indeed, might, if it had  
 occurred, have barred the plaintiff from taking out another  
 execution, or acting further upon that. But, this could  
 not be set up against him, by any other than those against  
 whom the judgment was originally rendered. If they  
 chose to waive this, or failed to avail themselves of it, and  
 a Sheriff afterwards made the money on execution, his  
 sureties could not defend themselves upon the plea, that if  
 the party had not discharged the defendant, arrested on  
 the *ca. sa.*, he might thus have gotten satisfaction of his  
 debt, and no responsibility could, in that case, have fallen  
 upon them. When a Sheriff declares and returns that he  
 has made the money, whether that be true or false, it can  
 be no default in the creditor, as it relates to the sureties of  
 the Sheriff, to discharge his original debtors.

Upon the whole, I think the order refusing to dissolve  
 the injunction should be reversed, and the injunction dis-  
 solved.

Judge COALTER.

The contract which was entered into between *Daniel*  
*Ragan*, the deputy Sheriff, and *Brown*, was one which  
 I think ought to meet with the disapprobation of every  
 Court; especially as it provided for a course of proceed-

ings on an execution which might eventually come to the hands of the deputy or his principal, or some other deputy Sheriff of the county, which, if not in strictness of law contrary to the truth of the case, at least held out great temptations to the substantial violation of his oath, and the duties of his office. The fact, that whenever the execution came to his hands, he would be interested in some slip being made, which would retard the recovery of this debt; that such slip was made, probably by his *sub-deputy*; and all the other circumstances of this case, make an ample commentary on this text.

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Had he stipulated with *Brown*, that in case the execution should come to the county of Rockingham, and be placed in his hands, that he would return it "satisfied;" and when it did come to his hands, he had refused to make such return, when the money really was in his hands, paid to him in discharge of the execution, though not paid after it came to his hands; and, if he could have found no property of *Brown* or *Bird* to levy it on, his conscience must have been asleep indeed, could he have made any other return on it than "satisfied." Suppose, in such case, the creditor had known that *Brown*, being about to leave the country, had thus provided for the indemnity of his sureties, *Bird* and *Deary*, by an actual payment of the debt to the Sheriff making this return; could he not have denied its truth, and would not the Court either have compelled the Sheriff to amend his return, or have given a judgment against him, in the same way as if he had received the money, after the execution had come to his hands, and returned "no property found?" Suppose he had returned the truth of the case, that he had received the money before the execution came to his hands, under a promise, that if it did, he would return it "satisfied," and then had the money in his hands, but elected to violate his agreement and leave the parties to their remedies against him as an individual, inasmuch as he did not wish to make either his principal or his sureties liable; I am

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strongly inclined to think, that such return would not avail him or them. Suppose *Brown*, about to leave the country, and not having time to see the creditor or his attorney, had so placed the money in the hands of the principal Sheriff, and he had returned the truth of the case, and that no property could be found, whereof to make the debt, would such return protect his sureties or him, from a summary judgment? I strongly incline to think not. Certainly if, in either case, the execution had been returned "satisfied," it appears to me, that the sureties could not alledge, in a Court of Equity, that because the money was paid before the execution came to hand, they were not responsible. I think so, not only because the execution was in fact satisfied, but because a return was made, which precluded the creditor, for a time, at least, from suing out another execution. For, suppose the sureties could afterwards procure a return of the truth of the case, and would thereby be relieved against the immediate effects of this return; yet, the return of "satisfied" being false, as is now supposed, would have been an official act, for which the sureties would have been responsible; and, although a judgment might have been recovered against them on a false return, yet, being responsible on another ground, a Court of Equity would not relieve.

The case under consideration, in regard to the point now discussed, only differs from the one supposed, in this: that the Sheriff was not to return the first execution "*satisfied*," but was to have the delay of a forthcoming bond; that is to say, although the debt was in reality paid, the Sheriff was not to return the truth of the case, but to proceed to levy and take a bond as aforesaid. It appears to me, that this cannot strengthen the argument for the sureties. The entering into such contract was undoubtedly wrong, as aforesaid; but, was probably not such a violation of his duty, as would have subjected his sureties, had the execution never come to his hands; but, when it was delivered to him, we then mount a step higher. He has

then the execution in his hands, and the money also to pay it; and, suppose the Court could wink, as he did, at the enormity that this payment was only to be applied to a subsequent execution, which might never come to his hands; yet surely he was bound to proceed legally and regularly with the execution then in hand. Say that neither he nor the Court are, in this stage of the business, to consider this as a discharge of the execution; then he was bound at least to proceed legally to levy it. This he neither does himself, nor procures to be done. He was interested that a slip should be made. This was made, either through design, or from the negligence or ignorance of another deputy, who, it is alledged, took the bond. His responsibility, and that of his sureties, began the moment the execution was put into his hands. At that time he held it, and the money for its discharge, under this contract. The contract, in connection with his official duty, now come into operation together. Suppose he had received the money and bonds on speculation at that time, under an agreement with *Brown*, that he was to have the delay of a forthcoming bond. Would not this be a violation of his duty *in limine*, for which his sureties would have been liable? Suppose this had been done, when *Brown* was on his departure from Virginia, with abundant property liable to the execution, but instead of doing his duty in levying it, *Brown*, by giving him an advantageous speculation in bonds, obtains liberty to depart; the bond is forfeited, and on a new execution, all parties, deputy Sheriff and all, are insolvent; is this violation of duty not to be visited on his sureties? The sureties on the delivery bond may have been good, but have also left the State before execution on it; so that there was no violation of duty, in not taking a sufficient bond. Surely, it appears to me, his receiving a bribe, as it were, from the debtor, in order to forego the lawful and plain line of his duty, however honestly he may have intended to pay the debt, cannot purge such transaction of its original impropriety.

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1824. This first fault is not purged by his afterwards taking a good bond, as it appears to me. I can see no essential difference between the two cases, either *Ragan* or his sureties this stage of the business, nor am I satisfied that, in could deny his responsibility to the creditor, as *Sheriff*, even 'if, by handing over the execution to another deputy, that deputy and his sureties had also become responsible. But, be this as it may, had *Ragan* returned this execution, or the second one, "*satisfied*," as probably he would have found himself bound to do, had he made the return on either, I think, for the reasons above stated, he and his sureties would have been bound to the creditor by that return. This was not done; but, a new execution was issued, and put into his hands, on which a forthcoming bond was taken, and another deputy returned it forfeited. The execution is issued on this forthcoming bond; it comes to the hands of *Ragan*, (no matter, at present, how;) and he being now bound by his contract, returns it "*satisfied*;" in consequence of which return, a judgment was obtained against the sureties.

This was a just, and substantially a true return, as it regarded *Norris*, the creditor, and *Brown*, the debtor. It is an official act, and binds *Ragan*, and his sureties, to the creditor, unless he, or his attorney, in a way binding on him, has done something which, in equity, must discharge the sureties.

It is said that they have done acts, which, however intended, amount to a fraud on the sureties.

First; that this last execution was levied on property, from which the money might have been made, even out of *Daniel Ragan* himself; which property was released by the agreement, that *Ragan* might take the execution, and make this return.

Second; that, on this agreement, delay was stipulated for, and granted to *Ragan*; so that, had the sureties brought their bill *quia timet*, the hands of the creditor would have been tied.

As to the first objection; it appears to me, that the fact that the execution was levied on property, which was then in the hands of the deputy *Crouse*, cannot vary the case from what it would have been, had the execution merely been in his hands. It would have bound the property of those against whom it issued, as much as if that property had been actually levied on; and, a discharge of this lien, if the defendants had property which was so bound, would have been an equal injury to the sureties. The seizure of that property only shews, *to a certainty*, that there was property bound, and that that property was within the power of the Sheriff; but, a knowledge that the property was seized, is denied by the attorney of the creditor.

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The question then recurs; was the assent of the creditor, that *Crouse*, if he thought proper, might deliver the execution to *Ragan*, that he might return it "*satisfied*," either in fact or in law, a fraud on the sureties? The execution on which the forthcoming bond had been taken, was, in the first instance, placed in the hands of *Ragan*. He had given a receipt, on the day that bond is alledged to have been forfeited, to the debtor *Brown*, for the amount of the money due. *Daniel Ragan*, and his brother, *John Ragan*, were sureties for *Brown* in this bond. The latter knew not of this fact, and so made no defence. The former did not, for reasons too manifest. An execution then was out against *Brown*, and *John Ragan*, (as to *Daniel* he could not complain of it,) on a bond, which the creditor had a right to believe had not been forfeited; and the Sheriff who had received the money, and who ought to have returned the execution "*satisfied*," is now willing to do justice, and having the money in his hands, is desirous to return "*satisfied*," as in substance was the truth of the case, on the execution in question. The creditor asserts that *Crouse* may place the execution in the hands of *Ragan*, in order that this return may be made. Suppose that he had known nothing about it, or, having

1824. been informed that *Ragan* had received the money on the  
*February.* day of sale, had refused to interfere one way or the other,  
and that *Crouse* had delivered the execution to *Ragan*,  
Norris who had made the return; could the sureties have had relief  
v. on this ground, against the creditor? Surely not.  
Crummey, &c. Could they have had recourse against *Crouse*, because he, knowing the same fact, had put it in the power of *Ragan* to make this return, instead of levying the execution himself? Was he guilty of a breach of duty, for which an action could have been sustained on his official bond, for placing the execution in the hands of another deputy? If this was a breach of duty, then *Ragan* had been twice guilty of a similar breach as to the preceding executions, for which he and his sureties were responsible. If it be said, that he placed those executions in the hands of other deputies to be acted on legally, but this was placed in his hands, in order to make a false return thereon, I answer, that this is assuming a fact which is denied. It is denied, that a Sheriff may not lawfully and justly return an execution "*satisfied*," without levying it upon the property of the debtor, when he has money of that debtor in his hands, to the amount of the execution. True, if there is a fraudulent combination, to subject the sureties of an insolvent deputy Sheriff to the payment of the debt, they may get relief; but, such fraud and combination must be shewn. If *Crouse* then might have lawfully handed over this execution to *Ragan*, having no interest that he should make a slip in the business, and without the imputation of any such interest, but *bona fide*, and to all appearance, an act of substantial justice to the debtor and his sureties, and to enable *Ragan*, as it were, to amend a former return, permitted, if not directed by him, to be made contrary to the truth of the case, I cannot perceive how the creditor can be injuriously affected by assenting to such act of justice. It ought to be shewn that he had some interest in, or some improper motive for, giving his assent.

As to the second objection, I have not considered the question, whether the principles involved in it apply to the case of sureties of Sheriffs, or to those of executors, &c. They seem to be excepted out of the act of Assembly giving a summary remedy to sureties, in the nature of a bill *quia timet*, and whether they were so excepted, because they do not properly fall within the doctrines on that subject, or it was thought best to leave them to the decisions of the Courts of Equity, to be adjudged according to the peculiar circumstances attending each case, is a question too important to be decided without full consideration.

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But, admitting for the present, that the doctrines do apply in this case, I nevertheless think, first, that after the return was made by *Ragan*, the creditor, if his rights stood in the same condition, as if he had been totally ignorant of all these transactions, except what appeared on the record, and are not changed by his assent to the return, could not have been compelled to litigate the question, how far *Brown*, or *John Ragan*, were bound to pay this money, in exoneration of *Daniel Ragan's* sureties. Those sureties would have an equal, or better right to litigate this matter, than the creditor. Nor would he have been bound to move to have his execution and this return quashed, so as to exonerate *Ragan's* sureties, and re-issue his execution, unless, indeed, his rights, under that return, were impaired as aforesaid; but, if this be the case, the sureties have now a right to repel his claim against them, on that ground, independent of that now under consideration.

Secondly. They could only file their bill then, to compel him to proceed by motion, &c. against *Ragan*, so as to get judgment as soon as possible, in order to levy the execution on his property, or to give them a speedy recourse against him.

As to this; there was, in the first place, no stipulation which could prevent this, unless *Ragan* had paid the \$2,000. But, if there was not time, and the \$2,000 were not paid, this agreement to stay was without consideration.



1824. The return on the execution, said to be the consideration  
*February.* received, was a favor granted to *Ragan*. It was to favor  
 him and his sureties, that all this arrangement took place.  
*Norris* The whole was understood to be a favor granted by, not  
*v.* one conferred on, the creditor, and depended on the other  
*Crummey,* deputy agreeing to give the execution to *Ragan*. The  
*&c.* creditor, as it regarded his interests, would have preferred  
 to let the matter go on as it was.

As well on this ground, therefore, as because, viewing  
 the whole tissue of misconduct now detailed in this case,  
 of which the creditor was ignorant, as well as the sureties,  
*Ragan* could not have opened his mouth, to say that the  
 creditor was bound not to proceed, and that he must, con-  
 sequently, lose his remedy against the sureties. The de-  
 cree must be reversed.

Judge CABELL.

There can be but one opinion as to the conduct of *Daniel Ragan* in the early stages of the transactions, disclosed  
 by this record. But, the fairness or unfairness of his con-  
 duct, is an enquiry unimportant to the decision of the pre-  
 sent case; nor is it material to ascertain whether he actu-  
 ally had an execution in his hands, at the time he gave the  
 receipt bearing date the 31st December, 1819; nor whether  
 the money for which that receipt purports to have been  
 given, was paid at that time, or at any antecedent period;  
 nor even whether his sureties could, in any manner, be  
 bound by that receipt. The execution which is the sub-  
 ject of the present controversy, was put into his hands,  
 after that period; it being clearly proved that he had pre-  
 viously received, from the debtor, funds more than suffi-  
 cient to discharge it. This execution he returned "mo-  
 ney made and ready to render;" and the question now is,  
 whether he and his sureties are liable for the amount of  
 the execution, in consequence of that return.

I do not think that a sound construction of the 48th section of the execution law, 1 R. C. 542, 543, will permit the Sheriff or his sureties to controvert the truth of the return. That the Sheriff or other officer is estopped to deny the truth of his own return, is the most obvious result of general principles; and it seems to me equally clear, that the spirit of the act of Assembly will not permit the sureties of the Sheriff to controvert it; except, indeed, in the case of a false return, procured by fraud in which the creditor participated. To make true returns on all process, is a duty which forms an important part of the condition of a Sheriff's bond. The return, therefore, in this case, if false, was a violation of the condition of the bond; and it was injurious to the creditor, as it barred him from taking out and prosecuting another execution. If, then, a Sheriff makes a return, and the consequences of that return are about to be brought to bear, as in this case, upon him and his sureties, it would be strange, indeed, that his sureties, those who have bound themselves that all his returns shall be true, should be permitted to escape, by alledging that the return is false; by alledging that which of itself is a forfeiture of their bond, and an injury to the creditor. The words of the act of Assembly leave no doubt on the subject. It declares, that "if any Sheriff, &c., shall make return, &c., that he hath levied the debt, &c., it shall and may be lawful for the creditor, &c., to demand judgment against such Sheriff, &c., or the securities, &c., for the money, &c., or so much *as shall be returned levied, &c.*;" thus making, as I conceive, the return, whether true or false, conclusive both on the officer and his sureties. Let us suppose, that a Sheriff, receiving an execution against a man in whom he has great confidence, fails to levy it, but returns it satisfied, relying on the promise of the debtor to have the money forthcoming, before it will be required by the creditor. Can it be believed, that the sureties would be allowed to say, in opposition to the return, that the money had not been received

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by the Sheriff? If the Sheriff and his sureties would be bound by the return in such a case, much more ought they to be bound in the present case, where funds sufficient to discharge the debt, had been previously put into the hands of the Sheriff, on an agreement that he would discharge it. Although the conduct of *Ragan*, in many of the previous stages of this business, was most grossly fraudulent, yet I do not perceive either moral or legal impropriety in his returning this execution satisfied, under the attending circumstances. And, if it was not improper in *him* to make this return, it was, *a fortiori*, not improper in *Allen* to consent to that return; the more especially, as he then believed that the money had been received by *Ragan* at a time when the former execution was in his hands. And this is a sufficient answer to that part of the case of the appellees, which seeks relief from an alledged fraudulent combination between *Ragan*, and *Allen*, the attorney for the creditor. There is not, in my opinion, the slightest foundation for such an imputation. For, even if *Ragan* was actuated, in this stage of the proceedings, as in some of the former stages, by a deliberate intention to commit a fraud, *Allen* did not participate in that intention. He did nothing which he had reason to believe was improper. If the fact had been, as *Allen* supposed, not only that the money had been actually paid to *Ragan*, but that he had given a receipt for it, at a time when the former execution was in his hands, it would have been right to discharge the property, and return the execution satisfied, as was done.

As to the pretension that the sureties are discharged by the time promised to *Ragan*, for payment, I have only to observe, that even if there was a sufficient consideration to support the agreement, yet the agreement to grant indulgence was a conditional one. It depended on a condition, which was to be performed before the creditor could make any motion against *Ragan* or his sureties; and, as that condition was not performed, the party was left to his

right of motion, in the same way, and to the same extent, as if the agreement had never been made. 1824.  
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I am of opinion to reverse the order of the Chancellor, and to dissolve the injunction.\*

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\* Judge BROOKE, absent.

**WHITTINGTON and others v. CHRISTIAN and others.** 1824.  
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Where the title to lands has been re-vested in the Commonwealth, for non-payment of quit-rents, such lands cannot be taken up as waste and unappropriated, under a Land-Office Treasury Warrant; but, they can only be acquired by petition.

A demise being laid in ejectment, before the title of the lessor of the plaintiff accrued, cannot be taken advantage of after issue joined.

In Virginia, the record of an action of ejectment is not conclusive evidence of the date of the demise, in an action for *mesne* profits, although it is conclusive as to the title.

In a demurrer to evidence, it is not necessary to enter on the record an admission of all proper inferences from the facts; but, it may be left to the Court to draw such inferences.

This was an appeal from the Superior Court of Amherst county. The case was elaborately argued in this Court, by *Stanard*, for the appellants, and *Johnson*, for the appellees; but, as the opinions of the Judges contain a complete view of the case, as well as of the points made in the argument, any other report would be unnecessary.

*February 26.* Judge GREEN.

The land in dispute is 1,000 acres, part of a larger tract, patented on the 10th day of September, 1755, to *James Christian, John Christian, and William Brown*, for

1824. 3,926 acres. *James* and *John Christian* died before the year 1768, and *Brown* survived them; and they being jointenants, the title to the whole land, as the law then was, survived to him. On the 7th of September, 1768, *John Christian*, the son of the patentee *John*, and father of the lessors of the plaintiffs, gave his bond to *John Edloe*, for the conveyance of 1,000 acres of the said patent, to be laid off as *Edloe* should choose, so as not to interfere with the lands already laid off, and surveyed by *James Higginbotham*. On the 5th of November, 1788, *James Higginbotham* surveyed and laid off these 1,000 acres, for the heirs of *Edloe*. On the 19th of January, 1798, *Alexander Edloe*, heir at law of *John Edloe*, assigned this bond to *John Christian*, the nephew of *John Christian*, the obligor; who, in February, 1798, assigned it to the obligor, who was the father of the lessors of the plaintiff, and for whose benefit *John Christian*, the nephew, had procured the original assignment. On the 29th of April, 1774, the land so patented was, upon the petition of *John* and *Charles Christian* against *William Brown*, and the devisees of *John Christian*, and the devisees of *James Christian*, by an order of the General Court, lapsed for the non-payment of the quit-rents, and the lands declared to be vested again in the Crown. *James London's* deposition, taken September 23d, 1801, in a suit in Chancery, between *John* and *Charles Christian* against *Reuben Norvell*, states, that the land called *John Christian's*, on the waters of Rocky Run, had been settled upwards of 45 years. That of *Charles Christian*, taken in the same suit, May 18, 1804, states, that *William Brown* agreed with *John Christian*, the father of the lessors of the plaintiff, that if he would make *John Edloe* a good title to 1,000 acres out of the said patent, he would relinquish all his right in the said land, and never after did he lay any claim to the land. The witness states, that he had no interest in the 1,000 acres purchased by *Edloe*. These 1,000 acres were charged for taxes to *J. Edloe*; and the taxes

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were paid by *John Christian*, in the name of *Edloe*, from the year 1782 to 1787, both inclusive, and for the years 1788 and 1789, without its being designated in the receipt on whose account the taxes were paid. This land, called *Edloe's*, containing 1,000 acres, is the land in dispute, and was granted to *Reuben Norvell*, by three patents, bearing date in October and November, 1797, upon surveys made in November, 1795, and February and March, 1796, and was settled by his tenant in 1802 or 1803; and held by him ever since. This was the first actual settlement made on that part of the land called *Edloe's*; and no act of ownership over this part of the land is shewn, except that, in 1772, a person who lived adjoining the land, got some timber for building a tobacco house from that part of the land, by the permission of *James Christian*, who acted as agent of the owners, who were reputed to be the *Christians* of New Kent, but the witness knew not which. But, *John Christian* was reputed to have an interest; whether as sole claimant or not, the witness did not know. The land where the timber was gotten, was not then, but was afterwards, called *Edloe's*. It is also proved, that, before the year 1770, there was an old settlement on a part of the patented land: that, *John Christian*, in 1773, claimed all the land not before sold; and, in the same year, *Gossett* took possession of the old improvements under *John Christian*, and that part of the land was afterwards sold to *Grissom* by *John Christian*: that *Henry Christian* settled on a part of the said land, as the witness understood, claiming under *John Christian*, in 1776 or 1777, and resided there in 1788: *John* and *Charles Christian*, at whose instance the land had been lapsed, conveyed 933 acres of the lapsed land to *Grissom*, on the 30th of October, 1777, and 507 acres to *Henry Christian*, on the 9th of December, 1777, and 507 acres to *Charles Christian* of Goochland, on the 24th of September, 1778. The heirs at law of *John Christian* brought their ejectment, upon the case above stated, against *Whit-*

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1824. *tington*, claiming under *Reuben Norvell*. The above  
*February.* was, in substance, all the evidence given. The demise is  
*Whitting-* laid on the first of January, 1795. The defendant moved  
*ton, &c.* the Court, to compel the plaintiffs to join in a demurrer to  
*v.* the evidence, which they resisted. But, the Court com-  
*Christian,* pelled them to join, and gave judgment for the plaintiffs.  
*&c.*

It is objected by the appellants, that the date of the demise laid in the declaration, being before the death of *John Christian*, and consequently before the title of the lessors of the plaintiffs accrued to them, they were then incapable of making a lease, and consequently the plaintiffs' action cannot be maintained, notwithstanding the act of Assembly which provides, that "after issue joined in ejectment on the title only, no exception of form or substance shall be taken to the declaration in any Court whatsoever;" the more especially as, by the common law, a judgment in ejectment is conclusive evidence of title, at the date of the demise laid in the declaration, in an action for *mesne profits*. The objection which is now urged was considered in the case of *Duval v. Bibb*, 3 Call, 362, and over-ruled; and I think rightly. The object of the statute was to limit the defendant in ejectment, after issue joined on the title only, to objections to the title only; so that, if the lessors of the plaintiff could shew a title at the time the suit was instituted, they were entitled to recover, notwithstanding any error in form or substance. The case of *Butts v. Blunt*, 1 Ran. 255, does not controvert this position. In that case, the evidence declared to be inadmissible had no tendency to prove any title in the lessor of the plaintiff. It was that title which was in issue, and to which the proofs of the parties were necessarily confined. The objection was not to the declaration, but to the proofs offered to shew a fee simple title in a person other than the lessor. It is true, that this construction of the statute and the rule of the common law referred to, cannot exist together. The consequence is, that the statute abrogates that rule of the common law *in toto*, and in an action for

*mesne* profits, the plaintiff may exhibit the judgment in ejectment as conclusive evidence of his title at the time of the institution of the action of ejectment, but must produce other proof to shew the commencement of the title established by that judgment.

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On the part of the appellee, it is strongly insisted, that the Court erred in compelling him to join in the demurrer to evidence tendered by the other party; and, the authorities shewing the original practice of the English Courts on this subject, have been brought to the attention of the Court, and ably commented on. From these it appears, that the former practice was, to require the party demurring to admit upon the record the existence of all facts, which the evidence offered by the other party conduced to prove. Those facts were to be ascertained by the Court; and in this respect, the Court might err in opinion, and if so, and the party refused to make the admission, he lost the benefit of his demurrer; or, if he made the admission on record, it bound him irrevocably. In the latter case, the error of the Court could never be corrected; and in the former, not without a protracted litigation, attended with great delay and expense, to wit: by bill of exceptions and appeal.

To avoid this inconvenience, the modern practice is, especially in Virginia, where it has been sanctioned by repeated decisions of this Court, to allow either party to demur, unless the case be clearly against the party offering the demurrer, or the Court should doubt what facts should reasonably be inferred, from the evidence demurred to; in which case, the jury is the most fit tribunal to decide; to put all the evidence on both sides, into the demurrer; and then to consider the demurrer, as if the demurrant had admitted all that could reasonably be inferred by a jury, from the evidence given by the other party, and waived all the evidence on his part, which contradicts that offered by the other party, or the credit of which is impeached; and all inferences from his own evidence, which do not necessa-



1824. rily flow from it. With these limitations, the party whose  
 February. evidence is demurred to, has all the benefit of the ancient  
 Whitting- practice which it was intended to give him, without sub-  
 ton, &c. jecting the other party to its inconveniencies; and no dis-  
 p. puted fact is taken from the jury, and referred to the Court.  
 Christian, I, therefore, think that the Court was right, in compelling  
 &c. the appellees to join in the demurrer.

Upon the merits of this case, I feel some difficulties. The questions which arise in this case, have been twice discussed here; once in the Court of Appeals, and once in a Special Court of Appeals; and the decisions of those Courts respectively, (considering the division of the Judges in the last case,) nearly neutralise each other.

These questions seem to arise in the case:

1. Whether the petitioners acquired, by the judgment of the General Court in 1774, any right which, connected with the possession, such as it was, enabled them to sustain an action of ejectment?

2. Whether the act of 1798, with a possession, such as it was, and the payment of taxes, gave to *John Christian* a title to the lands in question, upon which he could maintain an ejectment? and this last question will be materially affected by the question,

3. Whether the lands in question, after the establishment of the Land Office, were liable to be located by virtue of a Treasury Warrant? and if not,

4. Whether, nevertheless, the legal title of the Commonwealth passed to *Norvell* by the grants made to him?

These questions involve an enquiry into the general outline of the land laws of Virginia, affecting this question, both before and since the Revolution.

During the Royal government, the lands belonged to the Crown, and were granted by the Governor, with the approbation of the Council, according to such methods and instructions as were, from time to time, prescribed and given by the King in Council. It is impossible now, in consequence of the destruction of the public records, du-

ring the Revolution, to ascertain what were the rules thus established, in all their details. But, a pretty full outline may be gathered from the forms of patents, as they are registered—our acts of Assembly—the remaining fragments of the Council books, and the decisions of the Court of Appeals, since the Revolution, in which the ancient practice upon this subject is occasionally referred to. Notwithstanding the granting of lands belonged exclusively to the Governor and Council, under the direction of the King in Council, (2 *Hen. St. at Lar.* p. 253,) yet the acts of the Colonial Assembly, when sanctioned by the Crown, operated as limitations on, and modifications of those instructions.

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During the government of the Virginia Company, no reservation or condition was annexed to the grants, except a reservation of a quit-rent to the Company. But, soon after the charter of the Company was seized into the King's hands, we find that the patents had not only the usual reservation of quit-rents, but also the following proviso: *Provided, that if the said A. B. shall not plant and seat upon the said land, within the term of three years now next ensuing the date hereof, that then it shall and may be lawful for any adventurer or planter to make choice of, and seat upon the same.* (*Patent Book*, 1626, February 3.) And this continued to be the form of the patents until 1710. Not only might any other enter land not patented and seated according to the proviso of the patent, as if it were vacant, but in 1644 it was enacted, that lands deserted after they were settled, might be taken up and patented as deserted, by any other. But, in 1657 it was enacted, that no patent should thereafter pass, upon pretense that the land was deserted for want of planting within the term of three years, unless an order be first granted by the Governor and Council for that second patent, whereby the land is adjudged so to be deserted, and, that the first petitioner for deserted land shall not be denied to have the first grant. In 1661, this act was re-enact-

1824. ed, with the addition of a provision that the first petitioner  
*February.* should have the preference, "he making his rights," (that  
 is, charter or importation rights,) "appear when he petitions for the land."

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In 1699, (see Council Order Book, January 4, 1699, 1700,) new instructions addressed to Governor Nicholson, as to a new method of granting lands in Virginia, were received, the particulars of which cannot be ascertained, as they are not extant. But, it appears, that in this year began the practice of granting lands, upon consideration of composition money paid to the Receiver General; and, that all questions as to the priority of entries for vacant land, were decided by the Governor and Council upon caveats. (See back of Council Order Book, letter of August 23, 1706, containing an explanation of the then method of taking up lands.) In 1705, an act was passed "concerning granting, seating and planting of lands, &c." which Mr. Henning has published as omitted by mistake in the revisals of 1733 and 1752. But, it was not published, because it was never in force; for the Queen disallowed that act and the act of 1666, declaring what is meant by seating of land. (See Orders in Council, October 24, 1711.) New instructions were given under date of March 1, 1709-10. (See back of Council Book.) And in 1710, an act passed, probably conforming to those instructions, declaring that lands should be forfeited for failure to pay quit-rents for three years, and providing that no patent should be granted for lands forfeited for want of seating and planting, or for not paying quit-rents, until judgment and certificate obtained from the General Court; which could only be had upon a petition to the Governor, and filing a copy of the petition in the General Court; whereupon the party should be summoned, and thereupon the Court might declare the lands forfeited and again vested in the Crown, and certify to the Governor that the prosecutor was the first petitioner, and had prosecuted his petition with effect; which certificate shall entitle the party obtaining the same, to have a

patent for the same lands, in the same manner, and under the same restrictions and provisoes, as lands not before patented; and if there shall happen to be a greater quantity of forfeited land than shall be granted to the first petitioner, then the residue of such land, so forfeited, shall be granted to such other person or persons *as shall petition for the same*, under the like restrictions and provisoes, and in the same manner as lands not before patented shall be granted. This act was re-enacted in 1748, with some variations in the words, not affecting the construction of the act; and this latter act was in force until the Revolution. After the act of 1710, the patents had a proviso, that if the quit-rents were in arrear for three years, or the land were not cultivated and improved at the rate of three acres for every fifty, within three years, the land should be forfeited; "and thereafter it shall and may be lawful for us, &c., to grant the said land to such other persons as we, &c., shall think fit." (*Patent Book, December 12, 1710.*) In 1712, other instructions were received. (*See last Order in Council, April 22d, 1712,*) which probably varied considerably the former method of granting lands. I am confident, that these, or some preceding instructions, limited the right of taking up vacant lands at the pleasure of the party, and without the express order of the Governor and Council, to 400 acres in one tract. The act of 1705, which was disallowed by the Queen, attempted to fix the *maximum* of locations at pleasure, and without the authority of the Governor and Council, at 500 acres; and in my examination of old titles, I have observed, that after this period, the same person has procured, on the same day, several patents for 400 acres each, all adjoining and forming one compact body. There are also great numbers of orders on the Council Books, authorising individuals to take up larger quantities of land, invariably reciting, that the party had proved to the Governor and Council, his ability to seat and cultivate the same. And the act of 1779, *for adjusting and settling titles, &c.*, recognizes

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1824. as valid, entries upon warrants "with the surveyor of the  
*February.* county, for tracts of land not exceeding 400 acres, according to act of Assembly." But I cannot find the act of  
*Whitting-* Assembly alluded to.  
*ton, &c.*

*v.* An order of Council, of October, 1723, authorises lands  
*Christian,* entered and surveyed to be taken up by others, unless carried into grant within six months.  
*&c.*

Before 1661, a party desiring to take up lands, might first have a survey made, and then, upon producing a certificate that he had proved his rights (charter or importation,) for the quantity of land in the survey, or proving them before the Governor and Council, might take out a patent, (1642, chap. 68.) But, in that year, it was enacted, that such rights should be first proved, before any survey be made, "it being unreasonable that others, furnished with rights, should be debarred by pretense of survey, which, in itself, is no title."

In the Council Book, p. 112, *June 11, 1724*, there is an order dismissing a *caveat*, "because the plaintiff had no pretensions to the land;" and, in the same book, *March 6th, 1781*, is the following order: "on the petition of *George Woodruff*, setting forth, that 400 acres of land in Caroline county were, about three years ago, granted by order of the General Court, as lapsed, to *John Martin*, who hath not sued out a patent for the same, praying for a grant thereof; it is ordered, that the said *Martin* do attend this board the next Court of *Oyer* and *Terminer*, to shew cause why the said land may not be granted to the said petitioner."

I observe too, that the patents for lapsed land invariably recite the original grant; the condition as to the payment of quit-rents, and cultivating and improving; the failure of the original grantee to do so; and that the last grantee, or his assignor, "hath made humble suit to our Governor and Commander in Chief of our said Colony and Dominion, and hath obtained a grant for the same;" and then recites the rights upon which the last grant issues, as for

instance, compensation money paid to the Receiver General. 1824.

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There is an order in the Council Book, of November 16, 1711, which shews the method of proceeding, after the judgment of the General Court, declaring the lands forfeited, and the title re-vested in the Crown. This order was after the act of 1710, which was in force at the commencement of the Revolution, and shews that an inchoate right to the pre-emption was vested by the judgment of the General Court, but forfeited by the allowance of the petition (previously filed,) by the Governor and Council: that the judgment and certificate of the Court was the conclusive evidence upon which the petition was allowed; and that the composition money was paid, or rights produced, not before, but after the allowance of the petition; and the payment or production of which was one of the conditions on which the patent was to issue. The form of patents for lapsed lands indicates the same. It is in these words: "On the petition of *Augustine Smith*, for a grant of 400 acres, found lapsed from *Edward Buckley*, of the county of Essex, for the want of seating and planting, certificate being produced from the General Court, that the said *Augustine Smith* is the first petitioner for the said land, and hath prosecuted the same with effect, it is ordered, that a patent be prepared for granting the said land to the said *Augustine Smith*, upon the conditions mentioned in her Majesty's instructions." There are many similar orders on the Council Books, in the same form, and to the same effect.

I observe, also, that there is an order in the Council Books, (October 31, 1723,) directing surveyors of the *frontier counties* "to give public notice, at the Court-house, of the lapse of all such grants or entries as they shall know to be now void by law, and the present orders of the government; and that they then receive entries in common form, from any person desiring to take up any part of said lands." This regulation was partial, confined

1824. to the *frontier counties*, contradicted the provisions of  
 February. the act of 1710; and, if it ever had any force, was abro-  
 Whiting- gated by the act of 1748, which prescribed the manner of  
 ton, &c. acquiring lapsed lands.

Christian, In May, 1776, an ordinance of the Convention declar-  
 &c. ed, that all acts of the General Assembly of the Colony,  
 then in force, should continue in force.

From these materials, and what appears in the case of *Wilcox v. Calloway*, 1 Wash. 38, and other cases in the Court of Appeals, I gather, that lapsed lands were originally liable to be taken up at the pleasure of any other, in the same manner as other vacant lands: that this right was afterwards restrained, and they could only be acquired upon a petition to the Governor and Council, and upon a judgment of forfeiture: that this judgment was originally given by the Governor and Council, and afterwards by the General Court: that, originally, the petitioner was bound to produce rights, sufficient for the whole or a part of the land when the judgment of forfeiture was pronounced; and that any petitioner for the residue, not taken by the first petitioner, must also produce his rights, when he petitioned for the land: that this was dispensed with by the acts of 1710 and 1748; and that the petitioner might take the land, upon the restrictions, or, (in the terms of the act of 1748,) upon the "conditions" and provisoes, upon which unpatented land was granted: that those restrictions (or conditions) and provisoes, related to the consideration to be paid, and the form of the grant, and not to the manner of proceeding, for procuring the grant; for, that manner was, by the act of 1748, strictly confined to that by petition to the Governor and Council; whereas, the manner of procuring grants for unpatented lands was by entry with the surveyor and survey, or by survey under an order of Council: that the first or any subsequent petitioner forfeited the right thus acquired, by failing to comply with those conditions; that is, of producing rights, and taking out a patent, within six months after the allowance of his

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petition; as in the case of an entry and survey of unpatented land in ordinary cases, the claimant forfeited his right, unless he took out his patent within six months after the return of the survey; and upon the same policy, and for the same reasons, and in pursuance of the terms of the acts of 1710 and 1748: that such forfeiture of the rights of the first, or any subsequent petitioner, could not be taken advantage of, but by a subsequent petition, and the judgment of the Governor and Council thereupon; as the forfeiture of an entry and survey could only be taken advantage of, by a subsequent entry and survey; and, in those cases respectively, the party originally entitled could take out his patent, at any distance of time, if no other party had acquired a right: So that the right to sue out the patent subsisted, until defeated as aforesaid. And this resulted, in the case of lapsed land, from the provision of the statute, that such lands should not be granted, but to a petitioner, and to him, on the conditions upon which unpatented lands were granted. That this was the settled and practical construction of the law, appears from the cases decided in this Court, and will appear from examples hereafter cited; and it appears from the order of Council of the 6th of March, 1731, not only that lapsed lands could not be taken up as unpatented lands, (for, if they could, as the quantity of lands petitioned for in that case, did not exceed the quantity for which any owner of rights might enter with the surveyor *ad libitum*, there would have been no necessity for a petition in that case;) but that the mere petition did not, before it was allowed, destroy the right of the first petitioner. For, he was summoned to shew cause against the petition; and, I suppose, that there were excuses for not taking out the patent, which would have saved his right, as that he was prevented from taking it out by fraud or accident. Otherwise, the summons to shew cause would have been idle. If the only object of the summons was to enable him to shew that he had actually taken out a patent, then the certificate of the Secretary would have effectually decided that question one way or the other.



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I conclude, therefore, on this point, that the petitioners acquired, by the successful prosecution of their petition, not a right in or to the lands in question, so as to give them a right to enter thereon; but, a right to sue out a patent, upon producing rights sufficient to cover the quantity of land lapsed, that is, a right of pre-emption: that this right could not be lost, unless by a subsequent petition prosecuted with effect, and still subsists, unless the subsequent statutes have taken it away, or unless the patents to *Norvell* have destroyed it; and that the lands in question were never liable to be taken up upon Treasury Warrants, or on any other rights by entry and survey, as vacant lands, unless so made liable by statute subsequent to the judgment of lapse, pronounced in the General Court. The petitioners have never abandoned their right, such as it was, but have continually asserted it, by claiming the property, and paying taxes upon it for several years. Indeed, they seem to have treated this property rather as their inheritance than as a new acquisition; and, from the evidence, it is probable, that the proceeding for procuring the judgment of forfeiture, was with *Brown's* assent, and resorted to as a means of transferring his title to the *Christians*, in consideration of their assuring to *Edloe* 1,000 acres, to be chosen by him.

This brings us to the enquiry, whether the acts of 1779, chap. 12 and 13, (the only statutes which are alledged to have had that effect,) authorised the taking up of this land as waste and unappropriated, under a Treasury Warrant, or any other rights, and by entry and survey. The professed object of the 12th chapter was, to settle all claims to *unpatented lands* under the former and present governments, and professes to establish certain rules for settling and determining the rights to *such* lands, and fixing the principles upon which legal and just claimants shall be entitled to sue out grants, to the end that subsequent purchasers and adventurers may be enabled to proceed with greater certainty and safety. In pursuance of this profes-

sed object, it proceeds to provide for claims to waste and unappropriated lands, allowing some as valid, and declaring others to be void; thus using the words *waste and unappropriated* as synonymous with *unpatented*; and the latter as equivalent to "*not before patented*," used in the laws of 1710 and 1748. The whole object of this act was, to settle the rights to *such* lands, so that subsequent purchasers of *such* lands might proceed with more safety. Accordingly, it makes provision for all cases, in which unpatented lands could have been claimed by *entry* and *survey* under the former government, and for no others; such as claims to lapsed or escheated lands. It provides, that all *surveys* of waste and unappropriated lands, made upon any of the Western waters, at any time before the end of that session of the Assembly, should be good, if made regularly, and founded upon either, 1. Charter rights; 2. Importation rights; 3. Treasury rights, for money paid to the Receiver General, upon entries not exceeding 400 acres, according to Act of Assembly; 4. Upon any Order of Council or entry upon the Council Books, remaining in force; 5. Upon any warrant of the Governor for military service, under proclamation of the King. All these were declared to be valid, and all other surveys were declared to be void. As to claims not then surveyed, it provided that, 1. Claims under Governor *Dinwiddie's* proclamation, under specified circumstances; 2. Claims under importation rights; 3. For composition money paid; and, 4. Proclamation Warrants for military services, under certain circumstances, should be valid, and might be located and surveyed, as provided for Treasury Warrants, by the 13th chapter; and that all entries for tracts not exceeding 400 acres with a surveyor, might be surveyed and carried into grant. It provided, that when surveys had been regularly made, under entries with a surveyor, or order of Council, or entry in the Council Books, and the rights had not been before filed with the Secretary, the claimants might pay the composition money, and

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1824. take out grants. It provided for settlement rights; and  
*February.* that all orders of Council or entries for land in the Coun-  
*Whitting-* cil Books, except so far as such orders or entries respec-  
*ton, &c.* tively had been carried into execution by *actual survey*,  
*v.* should be void. This act provided for all possible claims  
*Christian,* for land under the former and present government, (by  
*&c.* confirming or avoiding them,) which, according to for-  
mer laws, were capable of being acquired by means of an  
*entry* or *survey*; but did not affect any other *claims* in  
any way. The former laws were still in force, which  
prohibited the acquisition of lapsed lands by entry and  
survey; and as to that class of claims, they were left as  
they were under the former laws. This, I think, is the  
just construction of the 12th chapter; but, the 13th chap-  
ter, which is, in effect, a part of the same act, leaves no  
doubt upon the subject. That act, after abolishing the re-  
servations of mines and quit-rents, and the conditions an-  
nexed to former patents, provides, that "no petition for  
lapsed land shall be admitted or received for, or on ac-  
count of, any failure or forfeiture whatsoever, alledged to  
have been made or incurred after the 29th day of Septem-  
ber, 1775;" and that "so much of all former acts of Assem-  
bly, as concern or relate to the entering, taking up, or  
seating lands, or direct the mode of proceeding in any case  
provided for in this act, shall be and are hereby repealed."  
The Legislature then permitted petitions for lapsed land to  
be thereafter admitted, provided the forfeiture incurred  
before September 29, 1775. It made no provision as to  
the mode of proceeding upon such petitions, and conse-  
quently left all the consequences of such petition to the  
former laws, which were not repealed in that respect, by  
the act of 1779, not coming within the terms of the re-  
pealing clause; such a proceeding having the effect of ac-  
quiring to the petitioner the title of the former owner, up-  
on his performing the requisite conditions, and not being  
an *entering*, *taking up*, or *seating* of lands; and the sta-  
tute having provided no other than the former mode of pro-

ceeding, to procure such title. This was the cotemporaneous construction of those statutes; for, vast numbers of petitions for lapsed land were prosecuted and disposed of in the General Court, up to 1782 and after; and Mr. Jefferson, as Governor of Virginia, in 1780, issued many patents for lapsed land, precisely in the ancient form, (omitting the reservations and conditions,) and upon consideration of the ancient composition in money. (See two patents of July 20, 1780, to *Thompson* and *Preston*, and one of the same date to *James White*, in the Patent Book in the Register's office.) The last of these patents were issued on a judgment of the General Court, pronounced April 25th, 1774, four days before the judgment in the case of *Christians v. Brown*.

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The lands in question, therefore, were never liable to be taken up as waste and unappropriated, under a Treasury Warrant, or any other right; and, if the petitioners or their representatives had, at any time after the grants to *Norvell*, sued out a patent for the lapsed land, as they had a right to do, until another petitioned for the land, (unless prevented by the act of 1798,) that patent would have given them title from the date of the patent to *Brown* and the *Christians*, and have over-reached the patents to *Norvell*, according to the settled law as repeatedly stated in this Court. The petitioners have not, to this day, lost the right to sue out a grant. For, the act repealing, on the 1st day of January, 1820, all acts not published in the last Revised Code, has a proviso, which declares, that such repeal shall not impair any right, accrued before the said 1st day of January; but such *right* may be maintained and *asserted* in the same manner as if this repealing section had never passed. This right was not *jus in re*, nor *jus ad rem*, so as to give a right to enter and possess the land; but, still it was a legal right to acquire a title, upon paying the composition and taking out a patent. And this right was preserved by the terms of the last mentioned statute, which ought to receive a liberal construction, for the pre-

1824. servation of all rights then existing, no matter of what nature. The sole object of that repealing clause seems to have been, to prevent the acquisition of new rights, under laws little known or understood, and seldom in use.

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This right of the petitioners to acquire a title to the land, did not give them any title to the land, legal or equitable. Their entry on the lands was as utterly unjustifiable, and as wrongful an intrusion on the possession of the Crown and of the Commonwealth, as the entry of any stranger would have been; and I think that no length of such possession could enable the possessor to maintain an action of ejectment against any one claiming under the Commonwealth, unless a patent could be presumed; that the maxim of *nullum tempus* would apply, in its fullest extent to such a case; and that such a possession could not enable the party to maintain an action of ejectment against a mere wrong-doer, since the defendant, shewing that the title and right of possession were in the Commonwealth, would present as effectual a bar to the action of ejectment, as if he had shewn a title and right of possession in any other; and, if an ejectment could not be maintained upon such a possession of one year, neither could it be maintained upon such a possession of 26 years. Such a possessor, if evicted, could only reclaim the possession by a warrant of forcible entry and detainer. It would follow that the plaintiffs could not, in this case, maintain their action of ejectment, unless the Commonwealth had a legal title, notwithstanding the patents to *Norvell*, which she could not vest in *John Christian*, or any other, and unless she did, by the act of 1798, actually vest such legal title in him; or, unless the relinquishment of the Commonwealth's title by that act, precluded the defendant from availing himself of the Commonwealth's title and right of possession, previously existing, to bar the plaintiff's action, even although the title of the Commonwealth did not thereby vest in *John Christian*.

I have already said, that lands which had been once patented and lapsed were, according to the laws in force when *Norvell's* patents issued, not liable to be located and patented as waste or unappropriated; and that those patents issued illegally. All lands are waste and unappropriated, which have not before been patented. They were not, according to law, appropriated in the sense of the statute, by entry and survey; and as to such lands, the first patent passed the title of the King or the Commonwealth, and none who had a merely equitable title, or inchoate right, by entry or survey, could assert it at law against such legal title. The law authorised the acquisition of the legal title to such lands, by entry and survey. But, as to lands once appropriated by patent and lapsed, no title could be acquired by entry and survey. They were expressly reserved to be granted in a specified mode; and a patent sued out in any other mode, was merely void. The Commonwealth did not hold lapsed land, by the general title by which she held lands which had never been granted; but, the title of the patentee was re-vested in the King, or the Commonwealth; so that a new grant thereof passed to the grantee all the rights of the original patentee, and such new grant over-reached, as is stated by the Court in *Wilcox v. Calloway*, any intermediate patent. This ascertains that such intermediate grant, obtained by entry and survey, was not considered as passing any title, or precluding the King or Commonwealth from making a new grant, effectual for passing the title of the original patentee. The Commonwealth, therefore, in 1798, could vest in *John Christian*, or any other, by patent or otherwise, as the law might prescribe, a perfect legal title to the land in question, notwithstanding the patents to *Norvell*, and which should over-reach those patents, by vesting in the grantee the title of the original patentee. It only remains then to enquire, whether the act of 1798 did vest the legal title to the land in question, in *John Christian*, or precluded *Norvell* from asserting the title of the Commonwealth, as a bar to this action.

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1824. That act provides, that no entry or location on any lands  
*February.* in this Commonwealth, which shall have been settled 30  
*Whitting-* years prior to the date of such entry or location, and upon  
*ton, &c.* which quit-rents or taxes can be proved to have been paid  
*v.* at any time within the said 30 years, shall be deemed valid;  
*Christian,* and any title which the Commonwealth may be supposed  
*&c.* to have thereto, ("thereto," that is, to any lands settled 30  
 years, &c.) is hereby relinquished. This act shall not ex-  
 tend to any entry or location, *regularly made according*  
*to law*, previous to the passing of this act. It appears,  
 from the evidence in this case, that the tract of land grant-  
 ed to the *Christians* and *Brown*, was settled by the pa-  
 tentees, more than 40 years before the passing of that act.  
 The settlement upon it operated as a settlement of the en-  
 tire tract. In 1773, pending the petition in the General  
 Court, *John Christian* took possession, probably in pur-  
 suance of the agreement with *Brown*, mentioned in the  
 deposition of *Charles Christian*. After the patent lapsed,  
 and before the land was sub-divided, that settlement was  
 occupied by the petitioners, and that occupation constitu-  
 ted a possession of the whole tract, which, being once  
 vested, continued in contemplation of law, *as to the*  
*whole tract*, until defeated by the actual entry of another;  
 or by a transfer by the petitioners of their claim or right  
 to another, which would carry with it their possession.

The right of a petitioner for lapsed land, was assignable  
 in part or in whole, as appears from many patents to as-  
 signees in such cases, reciting the assignments. In the  
 case at bar, this possession of the petitioners and those  
 claiming under them, was not interrupted or disturbed by  
 the surveying or patenting of the land. The surveys were  
 not made with intent, on the part of *Norvell*, then to take  
 any possession of the land; nor did the patents, which is-  
 sued in pursuance of those surveys, give him any seisin or  
 possession, since no title passed thereby, and a patent only  
 gives seisin as a consequence of its giving title. This pos-  
 session continued uninterrupted until 1803, as to the 1,000

acres in controversy, when a person claiming under *Norvell's* title, entered. Upon these 1,000 acres, taxes were paid for several years, commencing with the year 1782. Thus, these 1,000 acres were settled more than 30 years before the passing of the act, being part of a larger tract then settled, and taxes were paid upon it; so that it falls within the provisions of the statute. Was this possession the joint possession of *John* and *Charles Christian*, or of *John* only? Before the year 1768, when *John Christian*, in pursuance of his agreement with *Brown*, gave his bond to *Edloe* for the conveyance of the 1,000 acres in question, it seems that *Higginbotham* had made some divisions and surveys of the 3926 acres of land, for what purpose does not certainly appear, but probably for distribution amongst the representatives of the *Christians*. I am induced to think so, because two of that name obtained deeds from *John* and *Charles Christian* for precisely the same quantity of the land, 507 acres; the one, in 1777; the other, in 1778. When *John* entered into the possession of the land in 1773, he probably entered in consequence of the pendency of the petition, and the assurance that it would not be opposed; and, as he and *Charles* were the petitioners, it is probable that he entered, as well on behalf of *Charles*, as for himself. At all events, after the judgment of the General Court, they held jointly, as is proved by their joint conveyances to several persons. The last of those conveyances proves, that at that time, *Charles* and *John* had either divided the land and held their respective proportions in severalty, or that *Charles* had been satisfied for his interest out of the sale to *Gresham*, which is, I think, the fair inference. For, that deed states, that the land conveyed was bounded by the lands of *John Christian*. 1,000 acres belonged virtually to *Edloe*; 933 had been conveyed to *Gresham*; and 1,014 to the two *Christians*, leaving 979 acres, which were probably those called in the deed *John Christian's*; so that it is probable, that *Charles* had abandoned all claims to, and possession

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1824. of, the land. However this may be, *Charles* was bound  
 February. in equity as well as *John*, to make good 1,000 acres to  
 ~~~~~  
 v. *Edloe*, and when that land was, in 1788, laid out by *John*
 Whitting- *Christian* for *Edloe*, *Charles Christian* assented to it.
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 For, he says, he had no interest in that part of the land;
 and the joint possession of *Charles* and *John*, or the several
 possession of *John*, however that possession was, thereby
 passed to *Edloe*, and continued in him, until he transferred
 it again, in January, 1798, to *John Christian*, the father
 of the lessors of the plaintiff, through the agency of
John Christian, his nephew. The several possession of
John Christian may be dated at the time of that survey;
 he claiming under *Edloe*, who was then possessed, and
 indeed may be dated as far back as he and *Charles* held
 jointly; for, his several possession is claimed regularly,
 from and under that joint possession. I am inclined to
 think, that the act of 1798 did not vest the Commonwealth's
 title in any one; but, the Commonwealth, abandoning her
 title, left the party having the best possessory right, as
 against all others than the Commonwealth, to enjoy the
 property. Such a right might be acquired, even to lands
 belonging to the Commonwealth, to be vindicated by
 warrant of forcible entry or detainer, though not by
 ejectment or writ of right; even although the party and
 those under whom he claimed, might have been possessed
 for more than fifty years. On the other hand, such a
 possession might be defended in an action of ejectment
 against any one not having a legal title. If the statute
 vested the Commonwealth's title in any one, it must
 have been either in him, who, at the passing of the
 act, had a good possessory right to the land, against
 all others than the Commonwealth, (in which case,
John Christian's title under the act, would be good
 against all the world, as none could eject him, at
 that time, by any proceeding;) or, in him, who had
 made the settlement, having or claiming title, or
 those claiming under him; in which case, *Brown*,
 the surviving patentee and those claiming under him,
 would

be entitled under the statute. But, in that case, those claiming under *Brown* could not, at the time when *John Christian's* heirs were evicted, have asserted any right against them in any possessory action. The statute has a proviso, that nothing in that act contained, shall be construed to alter or change the construction of the act for the limitation of real actions; that is, not to exempt those claims from the operation of the statute of limitations, which would have been affected by it, if they had been originally valid and legal. *John Christian*, or *John* and *Charles* entered, in his or their own right, either under contract with *Brown*, or adversely to him; and in either case, their possession continuing until 1803, and being adverse to *Brown* and those claiming under him, they could not have been then evicted upon his title, in any possessory action. He and those claiming under him, had lost the right of entry by lapse of time. But, if, according to my view of the construction of the statute, the Commonwealth's title was vested in no one, but the right of possession was the only right which could be asserted under the statute, then the defendant could not, in this action, set up against the plaintiffs the possessory right of *Brown* or his representatives, that being barred by the statute of limitations. Nor could he oppose to them the title and right of possession of the Commonwealth, that being relinquished by the statute, and no longer existing, if not vested in *John Christian*. And, although it should be admitted, that the possession of *Christian* and his heirs, was rightful as to the Commonwealth only for five years before the latter were evicted, yet such a rightful possession, even for a day, would be a good title in ejectment, against any person who evicted him or them, who could not shew in himself or some other, or in the Commonwealth, a subsisting right of entry as against the lessors of the plaintiff, at the time of the institution of the suit. The entries, surveys, and patents, issued in pursuance of them to *Norvell*, do not come within the proviso of the act of 1798; for,

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1824. they were not regularly made according to law. The judg-
February. ment should be affirmed.

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Judge COALTER.

The land in controversy is part of a tract of 3,926 acres, for which a patent issued in 1755, to *James Christian, John Christian, and William Brown*. The *Christians* died before 1768, leaving *Brown*, the surviving patentee. This land had been seated and improved pretty extensively, probably soon after the date of the patent; for, in 1770, the improvements were of ancient date. It would seem, that *Brown* did not wish to avail himself of his right of survivorship; for, he agreed with *John Christian*, son of the patentee of that name, that if he would make a title to *John Edloe* for 1,000 acres, he would abandon all claim. *John Christian*, accordingly, in 1768, gave his bond to *Edloe*, to convey 1,000 acres, part of the patent land aforesaid, to be laid off any where he might choose, not interfering with prior surveys made by *Higginbotham*.

We hear nothing more of *Brown*, or of his rights, except so far as regards *Edloe's* claim under him for the 1,000 acres, which have ever since been recognized by the *Christians* as a valid and just claim.

Whether the *Christians* generally, or *John* alone claimed this land, up to the time of filing the petition herein-after mentioned, is not very apparent. One witness says, that in January, 1773, he went to New Kent, where *John Christian* resided, to purchase some of the land, understanding that he claimed all the said patent land then unsold. About the year 1770, one *James Christian* was understood to be the agent of the owner or owners, and one *Gosset* was in possession of the improvements as tenant. The witness, who speaks of these matters, says he understood, that *John Christian*, father of the lessors, was a claimant, but whether a sole owner or not, he does not recollect. The probability is, that *John Christian* then

claimed the whole, by virtue of this agreement with *Brown*, but that possibly, in order to quiet the representative of the other deceased partner, or in consequence of some general family arrangement, resort was had to the petition herein-after mentioned, as a species of conveyance, so as to quiet every thing. The object of this petition could not have been adversary to *Brown*, so as to defeat his rights, and those of *Edloe*, claiming under him, by virtue of the agreement aforesaid; because, by that agreement, *Brown* had abandoned his claim, and never thereafter alledged any claim to the land; and *John Christian* became bound to *Edloe* for the 1,000 acres. A further proof of this may be derived from the two deeds executed in 1777 and 1778, by *John* and *Charles Christian*; one to *Henry Christian*, and the other to *Charles Christian* of Goochland, for precisely the same quantity of land, viz: 507 acres each.

Under this family arrangement, as I take it to have been, *John* and *Charles Christian* petitioned for this land as lapsed for the non-payment of quit-rents, and on the 29th of April, 1774, a judgment of the General Court is entered in their favor, against *William Brown*, and certain persons named as devisees of *John Christian* and *Charles Christian*, the deceased patentees, they being summoned, and not appearing, &c.

William Brown having taken by survivorship was, in truth, the real defendant; but, no defence was made by any one; and, under the agreement with *Brown*, *John Christian*, one of the petitioners, was in fact the claimant of the land. Soon after this judgment, a conveyance was made by the petitioners to *Gresham*, for 933 acres of the land, it doubtless having been sold to him before; and this deed has reference to that judgment, and soon thereafter, the deeds for the 507 acre tracts were also executed, as above stated.

From this time forward, *Edloe's* claim to 1,000 acres is recognized, though its precise location had not as yet been

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1824. made. *Gresham* was possessed, by his purchase, of that
 February. part of the tract, containing the ancient improvements
 Whitting- aforesaid. Taxes are paid on *Edloe's* 1,000 acres for the
 ton, &c. years 1782, '83, '84, '85, '86, and '87. These taxes were
 v. paid by men of the name of *Christian*, for *Edloe*. At
 Christian, what time he died, does not appear; but, in 1788, *John*
 &c. *Christian* had the land surveyed for *Alexander Edloe*,
 heir of *John*, from whom he, *John Christian*, afterwards
 purchased. This purchase was made in 1798. In 1790,
 there is a receipt of the Sheriff for 2*l.* 15*s.* 5*d.* to be ap-
 plied to *John Christian's* (of New Kent,) land tax for
 1788-'89.

The land now in controversy is the land so laid off for
 the heir of *Edloe*, and purchased by *John Christian*, as
 aforesaid.

The defendants are in possession, and claim this land
 under three patents, issued to *Reuben Norvell*, by Land
 Office Treasury Warrants; the survey, in one case, being
 on the 27th day of November, 1795; in another, on the
 8th of February, 1796; and, in the other, on the 4th of
 March, 1796. The patents bear date in October and No-
 vember, 1797.

The first enquiry will be, whether the plaintiff can reco-
 ver in this action, independent of the act of 1797, *chap.*
 10, which passed on the 24th of January, 1798?

Secondly, if not, whether that act protects them?

If the decision of this Court in the case of *Norvell v.*
Camm, reported in 2*d* *Munford*, 257, is law, then it
 would seem to me that the judgment in this case can be
 supported, on that ground.

It was contended, in that case, that *Norvell* stood at least
 on as high ground as the lessee of the Commonwealth;
 and, as time did not run against the Commonwealth, it
 would not affect him. This might have been the case, had
 this land been vacant or unappropriated; but, it was pa-
 tented land, the title to which had been re-vested in the
 Crown, under the act, not absolutely, as I apprehend, as in

case of escheat after office found, but *sub modo*; that is, subject to be re-granted to the first or some subsequent petitioner, and to no other person; in which way *alone*, it seems to me, could the title, so vested in the Commonwealth, pass, at least under existing laws. The laborious researches of the Judge who has preceded me, seem satisfactorily to prove, that the title may, until a very late day, and perhaps even yet, be acquired in that way. That title, *thus circumstanced*, is now in the Commonwealth.

The possession of *Brown*, and, after him, of the *Christians*, or one of them, for their benefit, and that of *Edloe*, who claimed under *Brown*, up to the date of the judgment of the General Court, was a possession of patented lands; and their possession of the whole tract, after that judgment, until parts thereof were conveyed, and afterwards of the residue, for the benefit of *Edloe*, and themselves, continued down to the ouster by *Norvell*, or those claiming under him. Had they obtained a patent of subsequent date to that of *Norvell*, it would have had relation to the original grant to the *Christians* and *Brown*, and would have over-reached *Norvell's*, though prior in date.

The Commonwealth, then, had a right to make a grant after that to *Norvell*, which would have vested a paramount title at law, and under which, the patentee could have ousted him. *Norvell* then would rather seem an intruder on the rights of the Commonwealth, than as entitled to stand as her lessee. On the contrary, the petitioners having, at their expense, performed meritorious services, by thus throwing open this land to a re-sale, as aforesaid, and having thus paid in part the consideration, and even at this day probably having a preference over all the world to call for this legal title, on the payment of a small sum, as composition money, would more properly occupy the ground of lessees of the Commonwealth.

The legal title, then, which, considering the small amount to be paid by the petitioners, in order to entitle them to it, may be considered almost a naked outstanding title, or

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1824. trust for their benefit, stands in a very novel situation, un-
 February. precedented at common law, and, as to its legal effects on
 Whitting- the parties, must depend on the peculiar phraseology and
 ton, &c. construction of the act.

v.
 Christian, It seems to have been considered by the Court, in the
 &c. case now under consideration, that whatever may be the
 situation of the pure legal title, that yet as that is held by
 the Commonwealth, for the benefit of the petitioners, a
 possession by them, or those claiming under them, is suf-
 ficient to protect them against an ouster by a mere intru-
 der, both on them and the Commonwealth, as the paten-
 tee of lands, so situated, must be taken to be.

The Commonwealth may assert her title against the first
 petitioners, but it must be done in *one way*, and *one way*
only, to wit: by judgment in favor of a subsequent peti-
 tioner. There is no other mode prescribed by law, for
 affecting them. Until that is done, the first petitioners are
 in of right, have performed meritorious services, as afore-
 said, have little more to perform, and on doing which, they
 have an undoubted right to call for the legal title. This
 judgment is a part of their title; and the residue of it can
 be called little more than a naked, outstanding, satisfied
 trust for them. Yet, the defendant, without shewing him-
 self such subsequent petitioner, or at all connecting him-
 self with the judgment, seeks to lay hold of this outstand-
 ing title, and of this judgment, which is part of the plain-
 tiff's title, to defend himself by. On the whole, consider-
 ing the peculiar nature and objects of the law, I am not
 prepared to say that the decision aforesaid ought to be over-
 ruled.

But, if I am wrong in this, it appears to me that the
 lessors of the plaintiff are protected by the act aforesaid.

It is true, that act passed since the date of *Norvell's* pa-
 tent, and, of course, since his entry.

Had that entry been made since the act, I presume
 there would be little doubt, under all the circumstances of
 this case, that it is one which would come within its pur-
 view.

But, the act did not intend merely to reach and protect against entries made subsequent to the act. It was intended to cover cases where a party, thus holding, has been attempted to be interfered with, by an entry not sanctioned by law. And, I think, that in deciding cases under this act, we are no more stopped by the patent, because it issued before the act, than if it had issued after the act, on an entry made before. Controversies under this act would not arise, except in case of caveat, until a patent had been obtained, and the title was in issue. In such cases, we must, of necessity, go behind the patent, to see if the entry was lawful, and within the saving of the statute; in the same way that we must go behind the patent, where both entry and patent are subsequent to the act, in order to see that the entry in that case is since the act, and so not within its saving.

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It seems to have been admitted on all hands, that an entry by Treasury Warrant, on lands theretofore patented, was illegal; and that if the patents to *Norvell* had stated the true situation of this land, and although the Commonwealth might, in this way, have attempted to grant this land, that the patent would have been void on its face; there being no law to justify an entry or location of this land, by Treasury Warrant. We, however, in this case, are not stopped by the patent; and, consequently, as this land was not subject to be taken by a Treasury Warrant, I think the defendants are not within the saving of the statute.

I agree with the Judge who has preceded me, as to the demurrer; and, on the whole, I think the judgment must be *affirmed*.

Judge GABELL.

As to the objection, that the demise laid in the declaration was before the title of the lessors of the plaintiff accrued, I concur in the opinion, that the case of *Duval v.*

1824. *Bibb*, 3 Call, affords a conclusive answer. The point was there made, and expressly decided.

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I concur also in the opinion, that the appellees were correctly ruled to join in the demurrer offered by the appellant.

The great question in this case is, whether the lands in controversy, having been adjudged by the General Court to be forfeited for non-payment of quit-rents, were afterwards subject to be located by Treasury Land Warrants. The extensive researches into the records of the Council, of the Register's office, and of the General Court, by the Judge who first delivered his opinion, have enabled him to throw such new and strong lights on this question, as, I should think, must carry the most certain conviction to every mind, not influenced by interest or by prejudice. As it would be impossible for me to add any new view of this question, I will content myself with declaring my entire concurrence in the opinion, that these lands were not subject to be located by Treasury Land Warrants, and that *Norvell's* patents, being founded on such warrants, were merely void, and conveyed no manner of title whatever.

I concur also in the opinion, that (as no *caveat* has ever been issued,) the rights growing out of the judgment of forfeiture, not only existed till the year 1779, but were reserved by the act of Assembly of that year, and exist at the present moment.

Whether these rights, together with the possession of the lands for more than twenty years, proved in this case, be sufficient, without the aid of the act of Assembly of the year 1798, to authorise a recovery in ejectment, I will not undertake to decide. This Court, in the case of *Norvell v. Camm*, 2 Munf. a case precisely similar to this, solemnly determined by an unanimous opinion, that the action of ejectment would lie. I am free to declare that, as at present advised, I should be led to a different conclusion; for, I consider that the judgment of the General Court gave no title in or to the land, or any right of entry, but

only a right of acquiring a title on certain prescribed terms. But as, according to the view which I have taken, and which I believe all the other Judges have taken, this judgment may be affirmed, without any reference to the point settled in the above case of *Norvell v. Camm*, 2 Munf., I forbear to give any decided opinion as to that case.

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I think the present case comes within the letter, as it clearly does within the reason, of the act of Assembly of the year 1798, notwithstanding the patents to *Norvell*; for, the entries or locations on which they were founded, "not being regularly made according to law," do not come within the exception of the act; and the exception, as to them, is the same, as if it had not existed. The right of the Commonwealth being relinquished, the possession of the lessors of the plaintiff will unquestionably entitle them to recover, and the judgment ought to be *affirmed*.

Judge BRODKE, concurred in opinion with the other Judges, that the judgment of the Superior Court should be affirmed; but, as he had before given his opinion at length, in the case of *Norvell v. Camm*, 6 Munf. 239, on most of the points involved in this case, he deemed it unnecessary to enter at large into the subject at this time.

Judgment affirmed.

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A voluntary conveyance of property to children, at a time when the donor is largely indebted, is void against creditors.

A creditor cannot subject the property thus conveyed, by a suit against the donees, until he has established his demand at law, by obtaining judgment, and (in the case of personal property,) by suing out execution against the donor, or his representatives; or, by shewing, by a settlement of the administration account, that there are no assets in the hands of the executor or administrator, to satisfy the debt.

A voluntary conveyance is good between the parties, and only void as to creditors, who are thereby *delayed, hindered, or defrauded*.

Where a decree is rendered on behalf of a creditor, against several voluntary donees of the debtor, a Court of Equity should decree contribution among them, so that each man should only pay his just proportion of the debt. But, all the donees should be liable for the failure of any one to pay his proportion, until the debt is completely discharged, as far as he has received the funds of the donor.

This was an appeal from the Richmond Chancery Court.

William Temple filed his bill, stating, that on the 19th day of April, 1806, he recovered a judgment against *Edward P. Chamberlayne*, administrator of *Byrd Chamberlayne*, deceased, for the sum of 577*l.* 15*s.* and \$ 73 79, damages; that the said *E. P. Chamberlayne* died, without having paid any part of the said judgment, and administration *de bonis non* of the estate of the said *Byrd Chamberlayne*, deceased, was granted to *W. B. Chamberlayne*; to whom also was committed the administration of *Edward P. Chamberlayne*, deceased: that *E. P. Chamberlayne*, in his life-time, had not settled up his account of administration on the said *Byrd Chamberlayne's* estate; nor has he, as the administrator *de bonis non* of the said *E. P. Chamberlayne*, ever settled up the estate of his intestate: that the said *Byrd Chamberlayne*, in his life-time, and at the time of contracting the debt due the complainant, was possessed of very considerable estate, real and personal; and the complainant, having a claim upon him, on account of certain wheat lost by negligence on board of his (the said *B. Chamberlayne's*) vessel; and,

the complainant believes, after a suit had been instituted against him, in order to prevent the payment of the same, and to cover it from execution, in fraud of the complainant, conveyed for no other consideration than natural love and affection, on the 10th day of December, 1793, to his daughter *Evelyn*, now the wife of *Robert Pollard, jun.*, two negro girls called *Mahala* and *Dolly*; and, on the 1st day of January, 1798, he conveyed by five deeds pole, for the same consideration, and five shillings, expressed in each, to his son *Otway Byrd*, two slaves; to his son *Thomas Delaware*, two other slaves; and to his sons *John Dandridge* and *William Dandridge*, and his daughter *Mary Eleanor*, a like number of slaves, each; and, on the 24th of February, 1799, for the like consideration, he conveyed by another deed pole, to the said *Evelyn Byrd*, his daughter, another slave, named *Sally*; and, by another deed pole, of the same date, he, for a like consideration, conveyed to his son *Spotswood Dandridge*, a negro boy and girl: that the said *Byrd Chamberlayne* continued in the quiet and uninterrupted possession of the said slaves, from the date of the said several deeds, till the time of his death, which happened in the year when he and his son *Otway B. Chamberlayne* were both shipwrecked: that they died intestate, and administration was granted on the father's estate, as before mentioned; but, no administration has been taken on the estate of the son: that, the father, if he survived his son, was his sole distributee, and if the son survived, then his brothers and sisters above named, were his distributees; the complainant therefore prayed, that *William B. Chamberlayne* might be made a defendant, both in his character of administrator of *E. P. Chamberlayne*, deceased, and in that of administrator *de bonis non* of *Byrd Chamberlayne*, deceased: that the children above mentioned of *Byrd Chamberlayne* might also be made defendants: that the said *W. B. Chamberlayne* might be decreed to settle the administration account of the said *E. P. Chamberlayne*, deceased, upon the estate of *Byrd*

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1824. *Chamerlayne*, and his own administration upon the same
 February. estate: that he might be decreed to pay to the complainant
 Chamber- the balance in his hands, if any, in satisfaction of his judg-
 layne, &c. ment aforesaid; and, in case the same should be insuffi-
 v. cient, that the slaves conveyed by the said deeds, and the
 Temple. increase of the females, might be sold to satisfy the same,
 or so many thereof as may be necessary.

The answer of *W. B. Chamberlayne* admits, that he is the administrator of *E. P. Chamberlayne*, deceased, and the administrator *de bonis non* of the estate of *Byrd Chamberlayne*, deceased: that, it is untrue, that *E. P. Chamberlayne* died without having settled the administration account of the estate of *Byrd Chamberlayne*: that, by accounts settled by commissioners regularly appointed by King William Court, it will appear, (which settlement took place before the judgment of the complainant, mentioned in his bill,) that there remained in the hands of the said *E. P. Chamberlayne*, due to the estate, the sum of 62*l*. 17*s*. 8*d*.: that it will be unnecessary to have a new settlement, unless error on the face of the settlement, or fraud is alledged and proved: that his own administration of the estate of the said *Byrd Chamberlayne*, unadministered by the said *E. P. Chamberlayne*, has also been settled by order of the Court of *King William* county, by which it appears, that the estate of the said *Byrd Chamberlayne* is indebted to the respondent: that he conceives that he has no right to intermeddle with the negroes, mentioned in the complainant's bill, as he believes that the deeds therein referred to, were executed *bona fide*, and without any fraudulent intention: that the judgment, referred to in the bill, was against "the goods and chattels of the said *Byrd Chamberlayne*, in the hands of the defendant (*E. P. Chamberlayne*,) to be administered, if sufficient thereof hath or shall come to his hands to be administered, after payment of judgments and debts of superior dignity;" by which it will appear, that the respondent was justified in paying, after the date of the said judgment,

the sum of \$ 599 30, due on bonds, to *Richard S. Taylor's* representatives, stated in his administration account, &c. 1824.
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All the children of *Byrd Chamberlayne*, deceased, who are made defendants in the bill, filed a joint answer, stating, that they know nothing of the claim for wheat, set forth in the bill: that they believe the said claim to have accrued subsequently to the execution of the deeds therein mentioned, with the exception of that to *Evelyn B. Chamberlayne*, dated the 24th day of February, 1799, and of that to *Spotswood D.* of the same date: that they are advised, that even if the claim was prior to the deeds, yet, as it sounded in *tort*, and was to be recompensed in damages, which were never liquidated until the judgment was obtained in April, 1806, it could no more be considered as a debt due by *Byrd Chamberlayne*, deceased, than a claim to damages for an assault, or any other *tortious* act committed by him: that, at the time when the said deeds were executed, they believe the said *Byrd Chamberlayne* to have been perfectly solvent; but that, subsequently, he lost his life, and three vessels at sea, together with large quantities of wheat, and several negroes, which was the cause of the deficiency of assets: that they do not believe that he was actuated by any fraudulent intent, in executing the said deeds: that they admit, that the said *Byrd Chamberlayne* continued in possession of the slaves conveyed by the deeds, after the execution of the deeds; but, charge that all the said deeds, (with the exception of the first, dated the 10th of December, 1793, to *Evelyn B. Chamberlayne*, and the two last, dated the 24th of February, 1799, each; the first to the said *E. P. Chamberlayne*, and the last to *Spotswood Chamberlayne*,) were duly admitted to record in the Court of King William county; and that the two last, although not proved or acknowledged within eight months from the first execution, yet were both acknowledged by the said *Byrd Chamberlayne*, on the 24th of February, 1800, nearly five years

1824. before the recovery of the judgment set forth in the bill:
February. that, after the death of the said *Byrd Chamberlayne*, the
Chamber- possession of the said negroes accompanied the deeds, and
layne, &c. neither his administrator, nor administrator *de bonis non*,
v. ever claimed them, or in any manner opposed the possession
Temple. of the respondents. The last deed to *E. P. Chamberlayne* was made to supply the loss of one of the slaves conveyed by the former deed, she having died since the execution of the first deed.

Depositions were taken to prove, that in the years 1797 and 1798, *Byrd Chamberlayne* was considerably indebted: that executions were served upon him, to a large amount: that he postponed the payment of them, as long as possible: that he was very hard run for money, but always made out to pay the executions, in the end: that his estate was supposed to be fully sufficient to pay any debt that he owed; and that he owned two very valuable vessels, which were lost at sea: that he offered to sell a slave that had been conveyed to his daughter *Evelyn*: that many slaves, with a large quantity of wheat, belonging to *Chamberlayne*, were lost at the time he perished at sea; and that some of the children, to whom property was conveyed, were of very tender years.

The Court of Chancery ordered accounts to be made up of the administration of *E. P. Chamberlayne*, on the estate of *Byrd Chamberlayne*; and, also, of the administration of *Byrd Chamberlayne's* estate, by *W. B. Chamberlayne*, administrator *de bonis non*; together with an account of the administration of the estate of *Edward P. Chamberlayne*, by *W. B. Chamberlayne*, his administrator.

The result of these accounts was as follows:

The balance due the estate of *Byrd Chamberlayne*, by *E. P. Chamberlayne*, the administrator, is

\$ 1,774 42

The balance due *W. B. Chamberlayne*, as administrator *de bonis non* of the said *Byrd Chamberlayne*, after accounting for the balance due from *E. P. Chamberlayne*, is

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\$ 6 60

The balance due *W. B. Chamberlayne*, from the estate of *E. P. Chamberlayne*, is

\$ 1,560 14

The defendants obtained leave to file an amended answer, in which they say, that they positively deny, that the legal possession of the slaves referred to in the bill, after the execution of the deeds above mentioned, remained with, or in the said *Byrd Chamberlayne*, or that he ever exercised any ownership over them, further than as the natural guardian and next friend of the donees, all of whom, at that time, were infants, and resided with him; and they aver, that the possession of the said slaves accompanied the deeds, as expressed on the face of them, &c. They also alledge, that the verdict in question was obtained by agreement between the plaintiff and defendant, in a suit to which the respondents were not parties or privies, and, therefore, not bound by it.

The Chancellor decreed, that the deeds from *Byrd Chamberlayne* to his children, were, each and all of them, fraudulent and void as to the creditors of the said *Byrd Chamberlayne*, deceased, and, consequently, as to the plaintiff. He therefore decreed, that the slaves conveyed by the said deeds, or such of them as are still living, with the increase of the females, and the profits thereof, and the proceeds of the sales of such of them as have been sold by the donees, are, with respect to the creditors of the donor, the said *Byrd Chamberlayne*, deceased, part of the estate of the said donor; and, as such, liable to the debt due to the plaintiff. The Court therefore decreed, that the said deeds should be set aside, and annulled as fraudulent and void in respect to the plaintiff: that, unless the defendants,

1824. on or before the 15th of April next, pay to the plaintiff
February. the debt, with interest till paid, and the costs of the suit in
 Chamber- Chancery, the Marshal of the Court shall take possession
 layne, &c. of the said slaves; and, having advertised the time and
 v. place of sale, for four weeks successively, shall sell at public
 Temple. auction, to the highest bidder, for cash, the whole of
 the said slaves, or so many of them as may be sufficient to
 pay the debt of the plaintiff; and shall pay the proceeds of
 such sale to the plaintiff, in whole or in part discharge of
 the said debt, interest, and costs; reserving liberty to the
 plaintiff to resort to the Court, to subject the profits of the
 slaves conveyed by the deeds aforesaid, as well as the proceeds
 of the slaves that have been sold by the donees, to
 the payment of his claim.

The defendants appealed to this Court.

Wickham, for the appellants.

Leigh, for the appellee.

For the *appellants*, it was said: 1. That the conveyances were not void; for, although they were for the benefit of *B. Chamberlayne's* children, for no other consideration than natural love and affection, yet such conveyances are good, if not made with intent to defraud creditors, and when the donor was not insolvent. A party being merely *indebted*, will not vacate a conveyance founded on meritorious consideration; he must be *insolvent* at the time. *Newl. on Cont.* p. 384; *Lush v. Wilkinson*, 5 Ves. 384; 3 Bac. tit. *Fraud*, p. 315; *Ibid.* p. 320. The evidence proves, that *Byrd Chamberlayne* was perfectly solvent till the day of his death.

2. That the plaintiff was not entitled to go into equity against the donees, on the ground of a judgment against the *administrator*. There was no *privity* between them, and, therefore, the judgment was not evidence against the donees. *Phillips on Evidence*, 222, 232, 234; *Mason v. Peter*, 1 Munf. 437.

3. The decree is wrong, even if the plaintiff is entitled to recover on the merits. It is the constant practice of a Court of Equity, to apportion a debt among several defendants, so that each man should bear only his part. But, if any share should prove deficient, the rest will be decreed to make it good. *Hopkirk v. Dennis and others*, 2 Munf. 326. In this case, the decree was against the donees *in solido*; so that one may be answerable for the whole debt.

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For the *appellee*, it was said, that the deed of 1793, was the only one made before the cause of action accrued; and the same objection applies to them all. They were all made at a time when the donor was considerably indebted, to his children, without valuable consideration, and some of them infants. These are unequivocal badges of a fraudulent intention.

But, if the deeds had been for valuable consideration, they would be void, because the possession of the property did not accompany the deeds. The deeds were absolute, without any stipulation that the donor should remain in possession. This principle is fully established by the cases of *Edwards v. Harben*, 2 T. Rep. 587, and *Hamilton v. Russel*, 1 Cranch, 316.

The objection, that the judgment against the administrator was not admissible evidence against the donees, is not sound. It was not necessary for the plaintiff to *establish the debt* against the donees. The administrator was the proper person to contest the justice of the plaintiff's claim. The only object of the suit against the donees was, to remove the impediment of the conveyances, not to establish the debt. That it was only necessary to set aside the conveyances in the suit against the donees, and not to establish the debt, is proved by the cases of *Pack v. Bathurst*, 3 Atk. 269, and *Bainton v. Ward*, 2 Atk. 172; and the case of *Coleman v. Croker*, 1 Ves. jun. 160, proves, that the only ground of equitable jurisdiction is,

1824. to remove the obstacle of the deeds. Besides this, the
February. amended answer, calling for proof of the original claim,
 came too late.

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As to the decree being *in solido*, this was the only proper decree. If the deeds are fraudulent, the *whole* property is liable, and the plaintiff ought not to be embarrassed in the pursuit of a just claim, by the adjustment of the accounts between the defendants.

It was *replied*, that the deeds were not *void*, because they were *voluntary*, except as to creditors. As, between the parties, they were unquestionably good. *Thomas v. Soper*, 5 Munf. 28. And as to creditors, they are not void, in this case, because the donor was not insolvent. The mere circumstance of his being sued, is no evidence of insolvency.

The possession remaining with the donor, under the circumstances of the present case, was perfectly compatible with the rights of the donees. *Braxton v. Gaines*, 4 Hen. & Munf. 151.

The judgment was no evidence against the defendants. They were not *privies* to it; and the executor had no right in the subject. *Mason v. Peter*, is an authority in point. The plaintiff was not bound to sue the executor first. It is like the case of *marshaling assets*. But, if he was bound to sue the executor first, the consequence would not follow. The judgment against the executor would only bind the executor; and the *donees* who were not *privies* to that judgment, have a right to contest a claim which is to affect *their* property.

As to the delay in filing the amended answer, it is of no importance; and is sufficiently explained, by the fact, that some of the defendants were infants and *femes covertes*.

The property is not assets in the hands of the executor, and, therefore, the plaintiff must prove the *debt*, as well as that the deeds are void. If it be said, that the property is *assets*, it may be asked, why the plaintiff does not take out his execution at once?

The Court should have decreed contribution among the donees; because, they undoubtedly had a *qualified* property; and a Court of Equity will not require that one person, having equal right with others, should bear the whole burthen of a claim, to which the rest are equally subject.

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February 28. Judge GREEN delivered the opinion of the Court.

The appellee, claiming to be a creditor of *Byrd Chamberlayne*, prosecuted in the life-time of the latter, an action at law against him, which abated by the death of the defendant. The former thereafter prosecuted an action for the same cause, against *Edward P. Chamberlayne*, the administrator of *Byrd Chamberlayne*; and, having obtained a verdict, a judgment was rendered by consent of the parties, to be levied of the goods and chattels of the intestate, then in the hands, or which might thereafter come to the hands, of the defendant, to be administered, after satisfying thereout all debts of superior dignity and prior judgments. Upon this judgment, no further proceedings were had; nor was any execution taken out thereupon. The plaintiff then filed his bill against the administrator *de bonis non* of *Byrd Chamberlayne*, and the appellants, the children of *Byrd Chamberlayne*, to whom the latter had, in his life-time, conveyed sundry slaves, by several deeds; alledging, that those conveyances were voluntary and fraudulent as to the creditors of the donor, and praying that the slaves should be subjected to the payment of his demand. The defendants, claiming under those deeds, insisted upon their validity; that the plaintiff had no just demand upon *Byrd Chamberlayne*; and that the judgment at law was obtained by the collusion and fraud of the plaintiff and the administrator. The plaintiff offered no evidence in support of his demand, other than the record and judgment in the suit at law. That record, in-

1824. dependent of the verdict and judgment, affords no proof
February. *per se* of the justice of the plaintiff's demand. The Court
Chamber- of Chancery declared the deeds to be fraudulent and void,
layne, &c. and that the property should be surrendered by the defen-
v. dants, and sold for the satisfaction of the judgment; from
Temple. which decree, the defendants claiming under the deeds ap-
 pealed.

It is settled in England, by a series of uniform deci-
 sions, that no person, claiming to be a creditor, can im-
 peach, in equity, any conveyance fraudulently made by
 the debtor of his property, until he has established his de-
 mand at law, by obtaining a judgment, and by suing out
 an execution thereupon, if he seeks satisfaction out of the
 personal property of his debtor. The cases upon this
 point are cited, and commented on, by Chancellor KENT,
 of New York, in 2 *Johns. Ch. Rep.* 144; *Ibid.* 290; 4
do. 671, 682. If it were otherwise, and any creditor
 might, in the first instance, question the disposition of his
 debtor's property in a Court of Equity, it would produce
 the greatest inconvenience. The debtor, and a donee
 claiming under him, would be obliged to litigate, at the
 same time, the questions, whether the debt claimed was due
 or not, and whether the conveyance was valid or not; and,
 after an expensive and harrassing litigation, it might be as-
 certained that no debt was due. Without a contract for a
 specific *lien*, (unless in cases where a legal *lien* exists,) a
 creditor can only assert his claim against the person of the
 debtor, and cannot claim satisfaction out of any specific
 property belonging to the debtor, until his property be
 specifically bound to the satisfaction of the debt, by con-
 tract or by judgment, as to lands, or judgment and execu-
 tion delivered to the Sheriff, as to personal estate. The
 debtor has an unquestionable right to alienate his property
bona fide, or to prefer one creditor to another. If the
 creditor had the right to claim satisfaction out of his debt-
 or's property fraudulently alienated, in a Court of Equity,
 in the first instance; to give any effect to such proceeding,

the creditor must be considered as acquiring, by the exhibition of the bill, a specific right to be satisfied out of that property; and, if so, a subsequent sale of the property *bona fide* made by the debtor, which, in general, would be valid, could have no effect; and even a subsequent judgment creditor could not levy an execution upon the property in question. And, if several creditors pursued their remedies at the same time, in equity, there would be no rule recognized by law, by which to ascertain their priorities. Many other extremely inconvenient consequences would arise, from permitting such a proceeding, which need not now be insisted on. Besides, a voluntary and fraudulent conveyance is good between the parties, and those claiming under them, and void only as to creditors, who are thereby *delayed, hindered, or defrauded*. No creditor can be said to be *delayed, hindered, or defrauded*, by any conveyance, until some property, out of which he has a specific right to be satisfied, is withdrawn from his reach, by the fraudulent conveyance. Such specific right does not exist, until he has bound the property by judgment, and, in the case of personal property, by execution delivered to the Sheriff, and has shewn that he is defrauded by the conveyance, in consequence of not being able to procure satisfaction of his debt, in a due course of law. Then, and then only, he acquires a specific right to be satisfied out of the property conveyed; and shews that he is a creditor, and is *delayed, hindered, and defrauded*, by the conveyance. When a party has thus brought himself within the terms of the statute, he is entitled to the assistance of a Court of Equity, to remove the impediment to his legal rights: and the *lien*, frustrated by fraud, will be considered as still subsisting in equity.

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A judgment and execution delivered to the Sheriff, against a fraudulent donor, binds personal property in the hands of the fraudulent donee. The execution is against the goods and chattels of the defendant generally; and, the conveyance being void, the goods are still the goods of the

1824. donor, and may be taken under the execution. But, a
 February. judgment and execution against the executor or adminis-
 Chamber- trator of the donor, cannot bind the goods in the hands of
 layne, &c. the fraudulent donee; since the deed is good between the
 v. parties, and those claiming under them. The execution,
 Temple. in that case, is against the goods and chattels of the testa-
 tor or intestate, in the hands of the executor or adminis-
 trator, to be administered; and such goods are not, even in
 contemplation of law, in, and never can come to, his
 hands to be administered.

Although the judgment against the administrator of *Chamberlayne*, in this case, did not therefore bind the property in question; yet, it shewed that the plaintiff was a creditor; and the subsequent proceedings in this suit shew that he was *hindered, delayed, and defrauded*, by the conveyances in question; for, the property was thereby withdrawn from the satisfaction of his demand, and no other assets of the debtor remained for his satisfaction.

These proceedings establish those facts against the donees. A judgment against the donor, in his life-time, would have established the debt as against the donees, unless impeached by them on the ground of fraud, or for any other just cause; insomuch that an execution might be thereupon levied upon the property; and if the donees attempted to impeach the judgment, they must, for that purpose, have resorted to a Court of Equity. We can see no reason why a judgment against the legal representative of the donor should not have precisely the same effect. Indeed, in all cases where the question is, whether a person be a debtor or not, a judgment against him or his legal representative seems to be *prima facie* evidence of the fact, liable to be controverted upon the ground of fraud, or upon any other just ground, by any one a stranger to the judgment; except, perhaps, in the case of the real and personal representatives of the same person; in which case, either the one or the other might have been sued, in the first instance. Thus, all creditors are entitled

to satisfaction out of the assets of a deceased debtor, according to their legal priorities. Each has, therefore, an interest in the question, whether the debts claimed by others be due or not; yet, a judgment in favor of one, binds all others, upon the question, whether the debt be due or not; unless they can impeach it on the ground of fraud. So, in bankruptcy, a judgment against the bankrupt is evidence of the debt against other creditors, until impeached. This rule seems to be peculiarly applicable to the case of persons claiming under voluntary conveyances. *Saunders v. ———*, Skinner, 586, cited in 13 *Vin. Abr.* tit. *Fraud*, F. Pl. 18. The donees have attempted to impeach this judgment, but have failed in their proofs. The fact of the want of other assets (than those conveyed to the donees,) to pay the plaintiff's demand, is established in this suit. It is not for the donees to alledge that the assets in the hands of the administrator, ought to have been applied to the payment of this debt. They were applied to the payment of debts; and, as to the donees, that application was rightful, and not injurious. It was their right and duty to surcharge and falsify the accounts of the administrator, if they were wrong, which they have failed to do.

It was not necessary, as a pre-requisite to the maintaining of this suit, to have previously established the fact of a deficiency of assets, in another suit; or to have bound the property by an action against the donees, as executors *de son tort*, proving in that cause that there were no other assets to satisfy the demand, and prosecuting the same to judgment and execution, as might have been done. 13 *Vin. Abr.* tit. *Fraud*, C. Pl. 5. For, all creditors have a specific right to be satisfied out of the property of their deceased debtor, in the hands of his executor or administrator, if there be a rightful executor or administrator; or, if not, in the hands of his executor *de son tort*; or if, as in this case, there be a rightful executor or administrator, and also an executor or executors *de son tort*, out of the

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1824. debtor's property in the hands of the latter, if there be not sufficient assets in the hands of the former. This is in the nature of a *lien*; and the executor or administrator, and executor *de son tort*, are in the nature of trustees for the creditors. In general, when there is a rightful executor or administrator, there cannot be an executor *de son tort*; because, any person, having possession of the property of the deceased, is responsible therefor to the rightful executor or administrator, and ought not, therefore, to be responsible to creditors also. Otherwise, he would be doubly chargeable. But, in the case of fraudulent conveyances, the donee in possession is an executor *de son tort*, although there be a rightful executor or administrator. For, as he cannot be made responsible therefor to the rightful executor or administrator, the reason of the general rule fails in that case; and if the donee was not, in such case, liable as executor *de son tort*, the creditor would be without remedy. *Roberts on Fraud. Con.* 593, and cases there cited; *Pierce v. Turner*, 5 Cranch; *Edwards v. Harben*, 2 Term Rep.; 11 *Vin. Abr.* 219, *Pl.* 9, and notes; 13 *do.* tit. *Fraud, C. Pl.* 5.

The plaintiff, therefore, had a right, without first binding the property otherwise, and without otherwise shewing that he was defrauded, in consequence of there being no other fund, to satisfy his demand, than the property in the hands of the donees, by another suit, to go originally into a Court of Equity against the donees as executors *de son tort*, for a discovery, account and satisfaction, out of the assets in their hands; and, in that suit, to establish his demand, if it had been liquidated, or was a matter of account, and not before established; and to shew that he could not get satisfaction otherwise, and so was *hindered, delayed, and defrauded*. And this he has virtually done, although he does not call them in terms executors in their own wrong. In this case, a preliminary suit at law against the rightful administrator, or against the donees, was necessary, as the claim sounded in damages; and the rightful

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administrator was properly made a party, to account for the assets which had come to his hands. For, if he had had assets to pay the demand, the conveyances would not have been void.

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The deeds in question are clearly fraudulent and void as to creditors of the donor. All, except that to *Evelyn Beverley*, in 1793, were executed when the donor was indebted to a degree of embarrassment, and when the very debt, the satisfaction of which is now claimed, was due; and although he retained enough to satisfy all his debts, and lost a large portion of his personal estate afterwards, by a calamitous accident, he had no right to throw upon his creditors the hazard of such an accident, and to provide for his family at their expense. As to the deed of 1793, although it is probable that the donor was also largely indebted when he executed that deed, yet there is no sufficient evidence of that fact in this record. And, although the donor retained the possession of the property, yet, if the deed had been duly recorded, it might have been valid. But, being recorded on the proof of one witness only, that deed is also fraudulent and void, under that clause of the statute of frauds, beginning with the words, "and moreover." Independent of this clause of the statute, a voluntary conveyance, made by a person not at all indebted at the time, and not in contemplation of future debts, and without any other badge of fraud, would probably be good, notwithstanding the donor retained the possession; for, such possession could be no evidence of an intent to defraud creditors, when none existed, or were in contemplation of the party. But, the said clause invalidates even such a conveyance, unless, in the case of personal property, the deed be recorded on the acknowledgment of the party, or proof of two witnesses, or unless the possession remain *bona fide* with the donee.

It is also insisted, that the donees ought to have been subjected to a rateable contribution, for the satisfaction of the demand of the appellee. At law, persons claiming

1824. under voluntary, fraudulent, and void conveyances, cannot require a creditor to proceed against them severally, for rateable proportions of the debt. He might proceed against them severally, after the death of the debtor, as executors *de son tort*, for the full value of the assets of the debtor in their hands; and the insolvency of one would not excuse any other; and so it should be in equity, if an attempt to equalize the burthen, produced any unreasonable delay or detriment to the creditor. But where, as in this case, the creditor has convened all the parties, none of whom are chargeable with actual fraud, and where all the materials for a just apportionment are already in the record, and that can be made without any material delay or injury to the creditor; a Court, whose maxim is that equality is equity, should apportion the demand amongst the parties responsible thereto; the more especially as, if the burthen was unequally borne, and the suffering party could, in that event, claim contribution of the others, this would involve those parties in new litigations. But, this ought to be done with a reservation of the right to the creditor, to resort for satisfaction to all the parties responsible to him, to the full extent of their liabilities respectively, in the event of his failing, from insolvency or any other cause, to procure satisfaction from any of the parties, of their due proportions of his demand.

The decree should be corrected in this particular, and the appellants should pay to the appellee his costs, he being the party substantially prevailing.

BEALL v. SILVER.

1824.
March.

A creditor having obtained judgment against his debtor, without running interest, his execution is obstructed by a fraudulent conveyance made by the debtor, of his property. A suit in Chancery is then brought to remove the obstruction of the conveyance, and for general relief. The Chancellor ought to decree the interest, as well as to set aside the conveyance; the prayer for general relief being sufficient to cover the demand of interest.

In an action of debt for 352*l.* 5*s.* 4*d.* brought in the General Court of Maryland, in 1791, by *Charles Carroll* against *Zephaniah Beall*, the appellant *Nathaniel Beall* and one *Richard Gatrell* became jointly bound as special bail of *Zephaniah*. *Zephaniah Beall*, and the joint bail *Gatrell*, both removed to Berkeley county, Virginia, pending the suit; and *Carroll* coerced satisfaction of his judgment for the debt, of *Nathaniel Beall*. *Nathaniel* brought a suit against *Zephaniah*, in the District Court of Winchester, to recover the amount which he had been thus compelled to pay for him; obtained judgment in 1807 for \$1,695 51, damages, and \$12 49, costs; and sued out execution without effect, being defeated by the fraudulent conveyance herein-after mentioned. The judgment did not give running interest. Some years afterwards, *Nathaniel Beall* exhibited his bill in the Superior Court of Chancery of Winchester, against *Zephaniah Beall's* widow and children, and one *Francis Silver*; charging, that *Zephaniah* had made a fraudulent conveyance of slaves to *Silver*, in order to prevent the recovery of this just debt, which had actually been used to prevent the Sheriff from levying the execution; and praying, that the pretended conveyance might be set aside, and that so many of the slaves might be sold as would satisfy the amount of the judgment. The imputed fraud was denied, and some objections made to the jurisdiction of the Court, and for want of parties: the Chancellor over-ruled these objections; held the conveyance clearly fraudulent; decreed, that the

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defendant *Silver* should pay the plaintiff the *principal* due on his judgment, and the costs of this suit, within two months from the date of the decree; and directed that the Marshal, in default of such payment by *Silver*, should sell as many of the slaves as would suffice to satisfy the decree: and dismissed the bill as to the other parties. The plaintiff, afterwards in the same term, asked the Chancellor to amend the decree, and allow him *interest* on his debt. This was denied. From so much of the decree as withheld *interest*, the plaintiff prayed, and the Court granted, an appeal to this Court.

Leigh, for the appellant.

Tucker, for the appellee.

The question turned upon the propriety of the decree, in omitting to give running interest, under the circumstances of the case.

It was said for the *appellant*, that the plaintiff being driven into a Court of Equity by the fraudulent conduct of the defendant, that Court had cognizance of the *whole case*. It was not confined to the removal of the *hindrance*, but should go on and do complete justice between the parties. The Chancellor, therefore, did right in decreeing a sale of the property, thus fraudulently conveyed, but should also have decreed the running interest on the judgment.

For the *appellee*, it was said, that the decree properly refused interest; for, all the party had a right to ask, or the Court to grant, was, to put the fraudulent conveyance out of his way, and to decree that the property, and the rents and profits of it, (if necessary,) should be subject to the payment of the debt. The Court could only have decreed against *Beall*, what he could have been compelled to pay

under the execution, viz: the amount of the judgment; without the running interest. Otherwise, there would be one measure of justice at law, and another in equity.

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March 2. Judge BROOKE, delivered the opinion of the Court. *

The conveyance, which is sought to be set aside, was too obviously fraudulent, to require any comment on the facts in the record, to prove it; and, the only real question in the cause is, whether the interest on the judgment ought to have been decreed, as well as the principal. In the case of *Chamberlayne v. Temple*, (ante,) the ground on which a creditor, after the death of the debtor, may come into a Court of Chancery, to charge the donee holding the property of the debtor under a fraudulent deed, was fully explored. This case is much stronger than that case. Here, there was a judgment in the life-time of the debtor, and an execution which bound the property. In that case, the judgment was against the administrator only, and the property was not bound, otherwise than as the property of every debtor is bound, by the trust for the payment of debts. In this case, there is actual and gross fraud; in that, the fraud was only in construction of law. In this case, there is no legal executor or administrator, and the debtor died insolvent, except as to the property fraudulently conveyed. In that case, there was a legal administrator, into whose hands a large amount of property came to be administered; and the donees were held to be chargeable as executors *de son tort*. In this case, the appellee, though not so charged in the bill, must be considered as virtually an executor *de son tort*, though not sued in that character, as in the case referred to; and is liable, in the same manner, and to the same extent, to creditors, as a rightful executor. It would be strange, indeed, if this executor, in

* Judge GABELL, absent from indisposition.

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his own wrong, who has obtained the possession of the debtor's goods, by *actual* and not *constructive* fraud only, and who is entitled to the surplus after paying debts, should escape the payment of interest, when a rightful executor, bound to distribute the surplus, would be bound to pay it. The prayer for *general relief*, in the bill, being sufficient to entitle the appellant to an allowance of interest, the Court, on the ground stated, is of opinion to reverse the decree, and to send the cause back for further proceedings, according to the principles of this decree; *in* which, a decree is to be entered for principal with interest, to be paid out of the property, its proceeds and profits, on the terms of payment usual in such cases.



1824.

March.

TURNER v. STREET.

Where land is devised to be sold, and the proceeds paid to an infant, the infant has an election to take the land or money; and if his guardian sells the land, and the sale does not appear to be advantageous to the infant, a Court of Equity can elect for him, and bind him by such election.

This was an appeal from the Richmond Chancery Court. The case was argued in this Court by *Wickham* for the *appellee*, no counsel for the *appellant*. The following opinion will be a sufficient report of the case:

March 6. Judge GREEN, delivered the following opinion, in which the other Judges concurred.*

Jedediah Turner devised his land, supposed to contain 400 acres, to his sister *Susanna Turner*, upon condition,

* Judge BROOKS, absent.

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that, within a limited time, she should pay one-third of its value to the children of his sister *Polly Atkinson*, and one-third to the children of his sister *Sally Blackwell*. But, if she failed to pay as aforesaid, then the land was to be sold, and the money divided, between *Susanna*, and the children of his other two sisters. *Susanna* elected to take the land, and pay for it according to the will. *Sally Blackwell* was appointed guardian of all her children, who were, and still are, infants. The land was valued, and *Susanna* paid to the children of Mrs. *Atkinson* what they were entitled to. *Blackwell*, the husband of *Sally*, being dead, and indebted to *Susanna Turner*, as executrix of *Jedediah Turner*, it was agreed between *Susanna Turner*, then *Dowles*, and Mrs. *Blackwell*, that the said debt should be discounted against the sum due to the children of the latter, on account of the land; and that Mrs. *Blackwell* should take, in full of the residue due to her children, 110 acres of the land which had belonged to the testator. In pursuance of this agreement, Mrs. *Blackwell* gave to *Susanna*, a receipt in full of the sum due to her children, and the latter gave to the former her bond to convey the said 110 acres to her when required. This bond does not speak of Mrs. *Blackwell* as the guardian of her children, but is given to her individually. Mrs. *Blackwell* was put into possession of the land. The appellee being very desirous to procure this land, and anxious to conceal his wish, employed *Austin Thacker* to purchase it from Mrs. *Blackwell*, for him. *Thacker*, accordingly, treated and agreed with her for the purchase; but, before any writings were signed by the parties, Mrs. *Turner* informed *Thacker*, in the presence of Mrs. *Blackwell*, that she had given the land in satisfaction of the sum, which she owed to Mrs. *Blackwell's* children; and insisted, moreover, that the land belonged to the children, and that it had been intended for them. Mrs. *Blackwell* admitted, that it was taken in satisfaction of what was due to her children, but insisted that she had a right to sell it.

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Mrs. *Turner* also objected, that it was probable that the land would not hold out 400 acres; and, if so, that the 110 acres would be more than ought to have been given, for the satisfaction of the children's claim; and that the 110 acres, being assigned for that purpose, upon the supposition, that the whole tract contained 400 acres, if it fell short, there ought to be a rateable deduction. It was thereupon agreed between Mrs. *Turner*, Mrs. *Blackwell*, and *Thacker*, that a survey should be made, and the 110 acres be added to, or taken from, in the event of the whole tract containing more or less, in the proportion that 110 acres bears to 400: that *Thacker* should secure to Mrs. *Blackwell* the payment of the purchase money, in instalments; and that Mrs. *Blackwell* should convey the land to him. An agreement to this effect was signed by all the parties; which agreement was assigned within a few days to the appellee. Mrs. *Turner* and Mrs. *Blackwell* refusing to carry this contract into effect, *Street* filed his bill against them, and the children of Mrs. *Atkinson* and of Mrs. *Blackwell*, claiming the specific execution of the contract. Mrs. *Turner* and Mrs. *Blackwell* resisted this claim, upon the ground, that the land belonged to the children of the latter, and that they had been over-reached in the contract. The Court of Chancery decreed a specific execution of the contract; and the defendants appealed.

Mrs. *Blackwell* took this land, in satisfaction of her children's claim, at 25 or 27 shillings *per* acre; the valuation, at which the commissioners, in pursuance of *Turner's* will, had valued it. She sold it to *Thacker*, at \$6 25, *per* acre, and pending the suit, it is proved to be worth from \$7 to \$10 *per* acre. If, therefore, the children of Mrs. *Blackwell* had an equitable right to the land, or to the money proceeding from the sale to *Thacker*, and could assert their claim to the one or the other, at their election, no Court of Equity should have deprived them of that right, unless it appeared to be manifestly for their advantage, to confirm the sale; in which case, a Court of Equity

could elect for them, and bind them by such election. 1 1824.
Fonb. Equ. 88, note *f*, and the cases there cited; 3 *John-* March.
son's Ch. Cas. 190. The infant children of Mrs. *Black-*
well had such right. The property was purchased by *Turner*
 their guardian and trustee, exclusively with a fund belong- v.
 ing to them; and both Mrs. *Turner* and Mrs. *Blackwell* *Street.*
 affirm, that it was purchased for them, or rather taken as
 theirs, in *lieu* of the money due to them. These facts
 were distinctly known to *Thacker*, the acknowledged
 agent of *Street*, before he purchased for the latter. It
 was affirmed by Mrs. *Turner*; and, although Mrs. *Black-*
well insisted on her right to sell, she admitted that she had
 taken the land, in *lieu* of the money due to her children ;
 and the very terms of the contract, signed by *Thacker*,
 shew clearly that the land was taken, as the due propor-
 tion of the children, according to their interest in the
 whole tract of land. If, under these circumstances, Mrs.
Turner had conveyed to Mrs. *Blackwell*, and she to
Street, the latter would have been a trustee for the chil-
 dren of Mrs. *Blackwell*. The statute of frauds in Eng-
 land requires, that all trusts shall be declared in writing,
 except such as arise by implication of law, which are there-
 by left as at common law. By the common law, resulting
 trusts might be raised and supported by parol proofs. It
 was at one time doubted, whether, notwithstanding the
 exception of resulting trusts out of the English statute, it
 was not required by the general spirit of the statute, that
 resulting trusts, *if denied*, should be established by *writ-*
ten evidence, and not by *parol* proofs. But, the better
 opinion seems to be, that even under the English statute,
 a resulting trust may be raised by parol proofs. It was,
 however, never doubted, that a resulting trust, *confessed*
 by the trustee, was valid. 2 *Fonb. Equ. Book 2, chap. 5,*
and notes; Bac. Abr. Trust, C. passim; Foster v.
Colvin, 3 *Johns. Rep.* 216. This provision of the Eng-
 lish statute of frauds, has not been adopted into our Code.
 With us, the doctrine of resulting trusts remains as at com-

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mon law. This, however, is not material in this case, since, even according to the English cases, there would be, in this case, a trust for the children, even if the land had been conveyed as aforesaid. If a man purchase land, and cause it to be conveyed to another, there is a resulting trust raised, by operation of law, for the purchaser; and, if a trustee purchase property with the trust funds, there is a resulting trust for the *cestui que trust*; so that he may either claim the beneficial right to the property, or, at his election, claim a *lien* upon the property, for the security of his money invested in it. In such cases, the purchaser, even of the legal estate, much more so of a mere equity, from the trustee, with notice of the trust, stands in the shoes of the trustee. *See the books before cited.* This last mentioned case is precisely the case at bar. The proofs in the cause indicate, that it is against the interest of the infants, to carry the contract in question into specific execution. But, this may be otherwise. The proper course was, to refer it to a commissioner to enquire and report, whether it would be for the interest of the infants to confirm the sale, or otherwise. The decree should, therefore, be reversed, and the cause remanded for further proceedings to be had therein, in conformity to the foregoing views.

HITE'S Executor v. HITE'S Legatees.

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Testator gave \$ 1,000 to each of thirteen children ; directed his executors to sell his whole estate when they should think most expedient ; and, out of the proceeds, to pay, first his debts, and then these legacies, agreeably to seniority ; and gave the whole surplus to the same thirteen legatees. There being no other provision for these children, interest shall be allowed on these legacies from the testator's death.

It is not competent to guardians of infant parties, to waive any benefit to which the infants are entitled in a decree ; and it is error to decree on such consent. It is error to decree against an executor, absolutely, that he shall pay money at fixed future periods, in respect of funds not in hand, but which shall then come into his hands.

This was an appeal from a decree of the Superior Court of Chancery of Staunton. The case was this :

John Hite, by his last will and testament, after leaving his wife "a comfortable maintenance" (without specifying what,) and after reciting that he had made an ample provision for four of his children, (naming them,) devised and bequeathed, as follows: "And, as to the remaining part of my children," (naming them, thirteen in number,) "I leave \$1,000 to them, and each of them, and each of their heirs forever. It is my will and desire, that my executors hereafter mentioned, or any two of them, do make sale of my lands, and all other property, real and personal, *whenever they shall think it most expedient*; and out of the money arising from such sales, together with my bonds, notes, and book accounts, satisfy and pay all my just debts, and then *the legacies* above mentioned, *agreeably to seniority*: and, if there be *any surplus* after payment of my debts, and the legacies aforesaid, it is further my will, that *the same be equally divided among all my said*" (thirteen) "*children, share and share alike.*"

The bill was exhibited by the eight youngest of these thirteen legatees, (one of whom, being of full age, sued in proper person; the rest, being infants, by next friend, though two of them attained to full age pending the suit,)

1824. against the acting executor, against the testator's widow,
Marsh. and the five eldest legatees; praying an account of the ex-
 Hite's ex'r. ecutor's administration, a decree for the plaintiffs' respec-
 Hite's lega- tive legacies of \$ 1,000, and for their shares of the surplus.
 tees.

It appeared, from the answers, and from the proofs ad-
 duced, and the accounts taken in the cause, that the exe-
 cutor had sold the whole subject; the land (which was the
 chief and most valuable part of it,) on a credit, dividing
 the proceeds of the sale into as many as twenty annual in-
 stalments, many of which are not yet due, and the last
 will not fall due till 1829: that he had paid to each of
 the five eldest legatees, their respective legacies of \$ 1,000,
 principal without interest, at different dates, in the order of
 their seniority, successively, as the fund came into his
 hands: and that he was not chargeable with any unrea-
 sonable delay, in not having sooner paid the other legacies;
 nor was his conduct justly obnoxious to blame in any res-
 pect.

It also appeared, that the widow had renounced the
 vague provision made for her by the will, and claimed her
 legal rights; and that she had incurred considerable ex-
 pense in maintaining and educating her younger children,
 the plaintiffs; of which she asked, that an account might
 be taken, and that compensation might be decreed to her,
 in this cause, out of the plaintiffs' respective portions.

The Chancellor having directed all the accounts deman-
 ded by the parties, in general terms, the commissioner sta-
 ted and reported, accordingly, accounts of the executor's
 administration; of the amount due to each of the plaintiffs,
 on account of his legacy of \$ 1,000; of the dates, at
 which each of those legacies were or would be justly pay-
 able, agreeably to seniority, and in respect to the coming
 in of the funds of the estate; and of the expenses incur-
 red by the widow, for the maintenance and education of
 the legatees, respectively. But, in stating the amount due
 of the several legacies, *he allowed no interest on them:*
and the plaintiffs excepted to the report, for that reason.

This was the only exception taken to the main report in the cause. 1824.

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tees.

The cause coming on to be heard on the report, and this exception to it, the Chancellor said, his *impression* was, that the plaintiffs were entitled to interest on their respective legacies, without then *deciding* the point; and directed the commissioner to reform the accounts, and state them on that principle. The commissioner reformed the accounts according to this instruction: and then it appeared, that the five eldest legatees having each received his legacy, instead of there remaining funds enough to pay the plaintiffs their legacies, with interest so computed, there was a deficiency of \$ 2,607.

The Chancellor approved and confirmed this last report: observing—"The testator left *seventeen* children. For four of them, he states in his will, that he had made ample provision. To his thirteen remaining children, he bequeaths a legacy of \$ 1,000 a piece, to be paid according to seniority; and directs the surplus of his estate to be divided among his said children. Of these thirteen legatees, it appears from the commissioner's report, that the five eldest have been paid each his legacy of \$ 1,000, and are satisfied. It appears from the last report, that the payment of the legacies, *with their interest from the death of the testator*, to the plaintiffs, instead of leaving a *residuum*, will create a *deficit* in the estate of \$ 2,607. This *deficit*, the unsatisfied legatees, *viz:* the plaintiffs, could require to be apportioned among the whole thirteen legatees: but the *plaintiffs waive this benefit, and agree to apportion this loss among themselves*, in order to bring the controversy to a close; and the counsel for the defendants *refuse* to have the last report re-committed, for the purpose of *calculating interest* on the amount of the five legacies already paid, and *apportioning the deficiency among the thirteen legatees*, (which was offered to the defendants' counsel, if he desired it;) he contending that there ought to be *no interest* allowed on these legacies,

1824. until such time as the executor had so much as would pay
March. off the legatees agreeably to seniority, and that there ought
 Hite's ex'r. to be no abatement." Therefore, the Chancellor proceed-
 Hite's lega- ed to decree payment to the plaintiffs, according to the last
 toes. report; giving each *interest on his legacy from the tes-
 tator's death*, till the time appointed for the payment
 thereof by the decree; and abating proportionally for the
 deficiency, from the amount due to each of these eight le-
 gatees; upon the usual condition, that the legatees should
 give the executor refunding bonds. And he decreed, that
 the legatees should be satisfied respectively, in the order of
 their seniority, out of the monies due from the proceeds
 of the sale of the estate, successively, as the instalments
 thereof should fall due: and, not adverting that many of
 those instalments were to fall due at periods yet far dis-
 tant, the decree was absolute, that the executor should pay
 the respective legatees at the several dates when the instal-
 ments of the monies should fall due. With respect to the
 widow, the decree gave her a third of the distributable sur-
 plus of the testator's personal estate, (she having had dower
 of the real assigned her:) but, though it appeared by the ac-
 counts reported, that the plaintiffs were indebted to her for
 their maintenance and education, yet the Chancellor
 thought he could not regularly decree her satisfaction of
 those claims *in this suit*.

The executor appealed to this Court.

Wickham, for the appellant, made two objections to
 the decree:

1st. That it was clearly erroneous, in charging the ex-
 ecutor, absolutely, with the payment of the postponed
 legacies, at fixed future dates, in respect to the instalments
 of the funds which were to fall due at those dates; since,
 without any default of the executor, the instalments might
 very probably not be punctually paid, and possibly might
 not be paid at all. And this, he said, was an error in the

decree itself, not in the accounts on which it was founded, which only shewed the dates at which the funds were to come in; so that it was not necessary, that the Chancellor's attention should have been drawn to the point by an exception; and, therefore, though the point was not presented in the form of an exception, it was open to correction in this Court.

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2d. That the Chancellor erred in allowing interest on these legacies. He acknowledged the principle, that where a legacy is given by a parent to a *child*, and the payment thereof is deferred, the Court will allow interest, to be computed on the legacy from the parent's death, unless some provision be made by the will, for the maintenance of the child. *See the cases collected, 2 Roper on Leg.* 182-8. But, he insisted, that questions of this kind, like every other question on a will, must be determined by the intention of the testator; that, in the present case, the testator intended not to give interest on these legacies; that this appeared from the direction, that the legatees should be paid *according to seniority*; and paid out of *the proceeds of sales*, which the executors were authorised to make *whenever they should think most expedient*; and, yet more clearly, from the circumstance, that the *whole surplus* of the estate was given to these very legatees, share and share alike; so that, if interest be allowed on the legacies, it must be paid, not out of any distinct fund bequeathed or devised to others, or left undisposed of, but out of a subject bequeathed to the legatees themselves. He also argued, that the bequest of the whole surplus to the thirteen legatees, was such a provision made for them by the will, as that the Court, in respect thereof, ought not to allow interest on the legacies.

Leigh, for the appellees, answered:

1st. That all the accounts, which were taken and reported in the Court of Chancery, from first to last, had

1824. stated the legacies as payable, successively, at the dates
 March. when the instalments of the fund were to fall due: that the
 Hite's ex'r. executor had never taken any exception to the commis-
 sioner's reports for that cause: that it was not a point on
 Hite's lega- v. tates. which the Chancellor had exercised, or was required to
 exercise, his judgment: the executor had acquiesced in
 the reports, in this respect: the Chancellor had only de-
 creed according to the reports thus acquiesced in: there-
 fore, the executor could not avail himself of the exception
here. *Perkins v. Saunders, &c.*, 2 Hen. & Munf. 420.
 He said, it was obvious the whole controversy in the Court
 of Chancery, turned on the

2d point. And, on this, he maintained, that the decree
 was perfectly right: that the direction, contained in the
 will, that the legacies should be paid *according to seniority*,
 and paid *out of the proceeds of sales*, which the
 testator gave his executors a general power to make, *when*
they should deem most expedient, only shewed that the
 payment was deferred: that the *reason* why interest is al-
 lowed on a legacy from parent to child, the payment of
 which is deferred, and no provision made for the child in
 the mean time, is, that unless interest be allowed, the child
 is left destitute of maintenance until the time appointed
 for the payment of his legacy: that this reason held in the
 present case; for, no manner of provision is made for the
 legatees, during the interval between the testator's death
 and the time of payment of the legacies: that, as to the
surplus, none of them were to have any of that, on any
 account, not even to furnish them bread and raiment, till
 all the particular legacies of \$1,000 were fully paid off
 and satisfied: and, finally, that the testator meant to give
equal legacies to all his thirteen children; and equality
 could in no way be accomplished, but by giving interest
 on these legacies.

Some errors were alledged in the details of the decree,
 and of the accounts on which it was founded, and were the
 subject of observation at the bar: but, these involved no
 principle.

March 16. The PRESIDENT, delivered the opinion of 1824.
the Court: March.

Hite's ex'r.

Hite's leg-
tees.

That though the bequest to the thirteen specific and residuary legatees, are directed to be paid successively, according to seniority, as the funds of the estate, applicable to that purpose, came in; yet, that it was the intention of the testator to put them on the footing of perfect equality, as to the value of their respective interests in his estate; and that, for the purpose of effecting that equality, the said legacies should carry interest from the death of the testator; and that if there should be a deficiency of estate to pay the full amount of the legacies, with interest as aforesaid, they should abate equally: that, to effect this equality, care should be taken, in making up the accounts, that the legatees who are necessarily postponed, in consequence of the situation of the funds of the estate, should receive as much principal and interest, finally, as those legatees who were first paid, by calculating interest from the death of the testator, to the period when the postponed legacies are paid; and, to this end, as the personal assets were more than sufficient to pay the debts, a separate account should have been taken of the administration of the personal estate, upon the principles settled by this Court, in the case of *Granberry v. Granberry*: that, as soon as the debts were paid, the balance of principal and interest of that account should have been struck, as of that date; and, after setting apart one-third thereof to *Cordelia*, the widow of the testator, the residue should have been considered as a fund in the hands of the executor, for the payment of legacies; to which fund should be added, the principal and interest of the rents of lands received, after setting apart one-third thereof as the widow's portion; and also the proceeds of the sale of land, made by the executor, and received before that time, deducting therefrom his commission. To this fund, should also be added the balance of the debt due from *Edmund Nichols*, after de-

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tees.

ducting therefrom one-third part for the widow and the executor's commission; and also the instalments, coming due after that date, of the debt of *Jacob Nicholas*, whether paid or not, should be added; deducting therefrom the executor's commission, and carrying into the statement of the fund for the payment of the legacies, each of such instalments, at such a discount, that each instalment, when due, will pay the principal thus carried into that fund, with interest thereon from that date, until such instalment became, or shall become due: that this aggregate fund should be divided into thirteen equal parts; one of which should be retained by the representatives of the said *Lewis*, in right of his wife; one should be passed to the credit of *Harris* and wife, against which should be charged the payments, with interest thereon, made by *Lewis*, the executor, to *Harris*; and, if such payments, with interest, should fall short of such credit, the balance should be decreed to them; or, if they exceed such credit, *Harris* should be decreed to refund to the representatives of the said *Lewis*; one other part should be placed to the credit of *Browne* and wife, subject to the effect of payments made to him, in like manner; one other should be placed to the credit of *Francis A. Hite*, subject to the effect of payments made to him, in like manner; and another part should remain in the hands of the representatives of said *Lewis*, for the use of *John White*. The amount retained, and payments made, by the executor *Lewis*, or his representatives, ought to be considered as first applicable to the satisfaction of the interest due by him on the real and personal fund, up to the time that a balance should be struck of the administration of the personal estate, as aforesaid; and the residue of the aggregate fund will be equivalent to the principal money, applicable as of that day to the satisfaction of the legacies. So that the representatives of *Lewis* should be decreed to pay one of the said thirteen equal parts, with interest thereon, from the day the balance of the administration account of the per-

sonal estate shall be struck, until payment; to each of the remaining eight legatees, in succession, according to seniority, out of the funds already received, as far as they will extend, and out of the funds thereafter to be received, as fast as they come to hand. And the representatives of the said *Lewis* should be decreed to pay to the testator's widow, one-third of the balance of the principal and interest of the administration of the personal estate, and one-third of *Edmund Nichols's* debt and interest, if received; and, if not received, when received, and the rents of the lands, received as aforesaid; she and the legatees giving refunding bonds as the law directs. And liberty should be reserved to the parties, to apply, as occasion may require, to the Court, to correct any irregularity which may possibly arise from the failure to collect any outstanding funds, and to enforce the decree.

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March.

Hite's ex'r.

v.
Hite's legates.

The Court is further of opinion, that the decree is erroneous in directing the executor to pay, at fixed future periods, several sums of money, whether the same should then have come to his hands or not; and that it was not competent to the adult plaintiffs, or the guardians of the infant plaintiffs, to waive the rights of the latter, to a full and equal proportion of the estate, and to throw on them more than an equal proportion of the deficiency of the funds, for the payment of the legacies.

It is, therefore, decreed and ordered, that the decree aforesaid be reversed and annulled; and that the appellees *John Effinger*, *Isaac Hite*, and *Abraham Hite*, do pay to the appellants their costs by them in this behalf expended; and that the cause be remanded for further proceedings to be had therein, according to the principles of this decree. But, this decree is without prejudice to any suit *Cordelia Hite*, the widow, may be advised to bring, or any claim she may have against her children, or any of them, for maintenance and tuition.

1824.
March.

MOORE and Wife v. WALLER, &c.

An assignment of dower made by commissioners, under an order of Court, at the instance of one of several co-heirs, is binding on the widow, provided it be a *full and just assignment*; and it is binding, also, on the co-heirs, even if they are infants, provided the assignment be not excessive.

At common law, the heir had the power of assigning dower, without resorting to any Court whatever; and that power is not impaired by the act of Assembly:

If the widow keeps possession, in such case, of the whole land, under pretext that the assignment of dower was not legal, she will be accountable to the heirs for the rents and profits of all but her dower land.

This was an appeal from the Chancery Court of Williamsburg.

Carter Crafford died intestate as to his real estate, seised of a tract of land containing 900 acres. He left a widow, *Martha*, and four children; of whom, *John Crafford* was the eldest. *John Crafford* moved the County Court, to appoint commissioners to assign the said *Martha* her dower in the estate of her deceased husband. All the children were infants, except *John*. Commissioners were accordingly appointed, who met on the premises, and assigned the dower. No complaint was made by the widow, *Martha*, of any injustice in the assignment of her dower; nor was any objection made during the life of *John Crafford*. After these proceedings, *John Crafford* died, leaving *Martha Cary* his widow, and having devised all the land that he inherited from his father, to her, in fee simple. The said *Martha Cary* afterwards intermarried with *Robert Hall Waller*.

Soon after the death of *John Crafford*, *Martha*, the widow of *Carter Crafford*, gave notice to *Martha Cary*, the widow of *Carter*, that the dower, not being assigned by a regular suit in Chancery, was irregularly assigned, and consequently void; and that she should insist on the full enjoyment of the said land, called *Mulberry Island*, with the improvements, until the dower should be regularly as-

signed. Accordingly, the said *Martha*, the widow of *Carter Crafford*, took possession of the said lands; and brought a suit against the administrator of *John Crafford* for the rent of lands cultivated by him. 1824.
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Moore and
Wife
v.
Waller, &c.

The bill was filed by *Waller* and wife against *Martha Crafford*, to compel her to receive and abide by the dower allotted by the commissioners: to account for one-fourth part of the remaining two-thirds of the said lands, since the month of December, 1801, the period when her dower was assigned; and, that until the rents and profits be accounted for by the said *Martha*, as aforesaid, that she may be enjoined from all further proceedings in the suit against the administrator of *John Crafford*, deceased, for supposed damages, &c.

The Chancellor awarded an injunction, to stay all further proceedings in the suit against *John Crafford's* administrator.

A guardian *ad litem* was appointed for the infant children of *Carter Crafford*, who were also made defendants.

A joint and several answer was filed by *Martha Crafford*, and the guardian *ad litem* of the infant defendants, stating, that as soon as the defendant *Martha* was apprised that the assignment aforesaid was illegal, and that she was not bound by such *ex parte* proceedings, she expressed to *John Crafford* her dissatisfaction therewith; in consequence of which, a bill was exhibited against her in the County Court of Warwick, by the children of the aforesaid *Carter*; in which, among other things, it was prayed, that dower of the real and personal estate of the said *Carter*, might be decreed to the defendant *Martha*; it being alledged that no dower had been assigned her: that she is advised that she has a right, by law, to the enjoyment of the *Mulberry Island* lands, until dower be legally assigned, without accounting with any person for rents and profits, &c.

The defendant *Martha* afterwards intermarried with *Moore*, and he was admitted a defendant in this suit; and it abated as to *Robert Waller*, by his death.

1824. The Chancellor decreed, that the injunction to stay proceedings against the administrator of *John Crafford*, should be made perpetual: that the dower allotted to the defendant *Martha*, by the commissioners of the County Court, should be established and confirmed; the same being at least one equal third part in value of the said lands: that the said defendant be quieted in the possession thereof: that the residue should be divided into four equal parts in value, and one-fourth part allotted to the surviving plaintiff; and that an account be taken of the rents and profits of the said part from the 3d of December, 1801, before a commissioner, &c.

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Moore and
Wife
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Waller, &c.

The commissioner reported a balance due on account of rents and profits, from *Martha C. Waller*, of \$ 187 50, principal, and \$ 36 75, interest.

The Court confirmed the report, as to the principal, and rejected the interest, allowed by the report.

From this decree, the defendants *Moore* and wife appealed.

Leigh, for the appellants, contended, that the assignment of dower was not valid, because it was the act of *one heir* only out of *four*. It would not be binding on the other heirs who were not parties to it; and *John Crafford* himself, expressly affirmed its invalidity, in his suit in Warwick county. Under these circumstances, the widow was driven to the alternative, either to take the dower, so irregularly assigned; or to hold on to the property in her possession. She preferred the latter; and was fully justified in her choice by the act of Assembly. 1 R. C. (*old revisal*), p. 170, § 2.

Wickham, for the appellees. No complaint is made of the assignment in this case, on account of the inadequacy of the dower assigned. The only objection is to the *mode* in which the dower was assigned. This question is to be decided upon common law principles; for, the act of

Assembly has made no change, as to the *manner* of assigning dower. At common law, the heir may assign dower by his own act. Even a *disseisor*, *abator*, or *intruder*, may assign dower. *Co. Litt.* 35, *a*. It follows that *one* heir may make a valid assignment, although his co-heirs do not join in it; for, he has unquestionably more right than a mere *disseisor*. An assignment, even if inadequate, will be good *pro tanto*. *Fitzherbert's N. B.* 17, § 6. In the case of *Foote v. Fitzhugh*, 3 Call, 13, it was decided, that an assignment made upon mere motion, ought not to be set aside *in toto*, but the error, if there was one, corrected.

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Moore and
Wife
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Waller, &c.

The bill of *John Crafford* is no evidence against him, as it is always considered as the mere act of counsel. But, if it could be attributed to him, he was clearly mistaken.

March 30. Judge CABELL, delivered the opinion of the Court.*

The act of Assembly which declares, that until dower shall be assigned to a widow, "it shall be lawful for her to remain and continue in the mansion-house, and the messuage or plantation thereto belonging, without being chargeable to pay the heir any rent for the same," is highly beneficial to her; but, it was not intended to operate injuriously to the heir. It was intended not to restrain, but to stimulate, the heir; not to diminish any of his powers, but to urge him to their just and speedy exercise. He had the power, at common law, to assign dower without resorting to any Court whatever; and that power is not impaired by the act of Assembly aforesaid. The widow is bound to accept the assignment made by him, provided it be a *full* and *just* assignment; and, in that event, if she persist in holding any more of the lands than

* Judge CARR, who had been appointed on the death of Judge FLEMING, sat in this cause. Judge GREEN, absent.

1824. those thus assigned, she ought to be chargeable therefor.
March. The assignment of dower by an adult heir, in behalf of
 Moore and himself and his co-heirs, who are infants, is as binding on
 Wife them as it is on him, provided the assignment be not ex-
 v. cessive.
 Waller, &c.

It is no objection, that the assignment in this case was made by commissioners under an order of the County Court. That order was made at the instance of the heir, and the assignment by them was his assignment. Even the widow herself has never objected to it as *not being full* and fair; and, as to her misapprehension of the law, in supposing it not to be obligatory, it would be unreasonable in the extreme, that she should avail herself of it, to hold the whole estate rent free.

The decree is *affirmed*.

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March.

HOPKINS, &c. v. STEPHENS and others.

A trustee, holding the legal title, may maintain ejectment, even after the trust is satisfied. Although a *cestui que trust*, after the trust is satisfied, may maintain ejectment, that does not deprive the trustee, holding the legal title, of his right to maintain such an action.

This was an appeal from the Superior Court of Law for Cabell county.

In ejectment, the declaration contained two counts; the first of which laid a demise from *Samuel M. Hopkins*; the second laid a demise from *James T. Watson*. At the trial, the plaintiff introduced, in support of his title, a patent from the Commonwealth of Virginia, to *Samuel M. Hopkins*, for the lands in question. The defendants then introduced a deed of conveyance between *Samuel M. Hopkins*, *Oliver Wolcott*, and *James Watson*, reciting that

the said lands were purchased by the said *Samuel M. Hopkins*, at the expense and with the funds of the said *James Watson*, and are held by the said *Samuel M. Hopkins* in trust for the said *James Watson*. The deed then conveys the land in question to *Oliver Wolcott*, his heirs and assigns for ever. The plaintiff then introduced a deed or declaration of trust executed by *Oliver Wolcott*, witnessing that the deed last mentioned was made to him in trust for, and for the sole use and benefit of, the said *James Watson*, and his heirs, &c; and to the end that for his and their benefit, he, (the said *Wolcott*,) may, from time to time, and as often as occasion might require, sell, dispose of, convey, lease, or contract to sell, convey, &c., the said lands, or any of them, for cash or on credit, in such manner as he, (the said *Wolcott*,) might think proper, and most for the advantage of the said *James Watson*, his heirs, &c.

The plaintiff then introduced a deed of conveyance between *Samuel M. Hopkins*, *Oliver Wolcott*, *Mary Watson*, widow, and *James T. Watson*, which recites, that *James Watson*, the party to the foregoing conveyances, was since dead, leaving the said *James T. Watson*, his only son and child, and the person principally interested in his estate; and, that the parties to this deed are willing that the lands and premises aforesaid shall be conveyed to the said *James T. Watson*, in fee simple, and discharged of all trusts, to the end that he may be able to make absolute conveyances thereof; for which purpose the said *Mary Watson*, widow of the said *James Watson*, and interested in his estate, has joined in this conveyance. The deed then conveys the lands in question to *James T. Watson* in fee simple.

The jury found a verdict for the defendants, and the plaintiff moved the Court for a new trial; but, the motion was over-ruled, there being no evidence given of the death of *James Watson*, and that *James T. Watson* is his heir, except what appears upon the face of the deed last mentioned. The Court was of opinion, that it was necessary

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Hopkins,
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&c.

1824. for the plaintiff to establish these facts, to entitle him to recover on the second count in the declaration; and that the evidence furnished by the said deed (given in evidence by the plaintiff,) was not so conclusive as to justify the Court in granting a new trial.

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Hopkins,
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Stephens,
&c.

To this opinion, the plaintiff excepted.

At the trial, the defendants moved the Court to instruct the jury, upon the foregoing evidence, that the plaintiff cannot recover upon the second count in the declaration, against any of the defendants in this cause, unless he prove that *James Watson*, the *cestui que trust* aforesaid, is dead, and the said *James T. Watson* is his heir at law; and the Court instructed the jury accordingly. To which opinion and instruction, the plaintiff excepted.

Judgment was rendered for the defendants, and the plaintiff appealed.

Call, for the appellant.

Scott, for the appellees.

March 31. Judge CARR, delivered the opinion of the Court.*

This is an action of ejectment. The declaration contains two counts; the first on the demise of *Hopkins*; the second on that of *James T. Watson*. To support his case, the plaintiff introduced the patent to *Hopkins*, dated in 1796. The defendants, to prove the title out of *Hopkins*, introduced the deed from him to *Wolcott*, dated 19th of February, 1806. The plaintiff then exhibited the declaration of trust, executed by *Wolcott*, and dated the 19th of February, 1806; and also the deed from *Hopkins*, *Wolcott*, and *Mary Watson*, widow of *James Watson*, to *James T. Watson*, dated 22d of June, 1806. "Whereupon," says the record, "defendants' counsel

* Judges BROOKS, and GREEN, absent.

moved the Court to instruct the jury, that the plaintiff cannot recover upon the second count, against any of the defendants, unless he can prove, that *James Watson*, the *cestui que trust*, is dead, and that the said *James T. Watson* is his heir at law. The Court instructed the jury accordingly." To this opinion, there is an exception; and we are now to decide, whether the opinion be correct or not. We think it erroneous. Why was it necessary for *James T. Watson* to prove his father's death, and that he was heir at law? We presume that this idea was taken from the case of *Hopkins et al. v. Watson et al.*, 6 Munf. 38, where this Court say, that the *cestui que trust* (the trust being satisfied,) may maintain ejectment; and that the trust introduced by the defendants, in that case, shewing the trust was satisfied, and that *James T. Watson* was heir, also might bring ejectment. But, while asserting this doctrine, the Court did not mean to say, that the trustee, holding the legal title, could not support an action of ejectment, nor that his grantee could not. Suppose, in this case, that the *cestui que trust* is alive, and the trust unsatisfied; still the trustee, *Wolcott*, having the legal title, his deed conveyed that title to *James T. Watson*; and though he would be considered as taking the land subject to the trust, that would not affect his power to maintain ejectment. We say that the legal title passed from *Wolcott* to *James T. Watson*, because this is the inevitable effect of the deed; except where the grantor is out of possession; by which we understand such a divestiture or *ouster*, as prevents the operation of the deed; and we consider the possession of the defendants, stated in this case, far too vague and uncertain, both as to time and its nature, to work this *ouster*.

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Stephens,
&c.

The instructions of the Court, therefore, on this point, were wrong; and (without deciding any other point in the case,) the judgment is reversed, and the cause remanded for a new trial, on which no such instructions are to be given.

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May.

WYCHE v. MACKLIN. SAME v. SAME. SAME v.
HARWELL; and GEE v. MALONE.

In an action at law, on a specialty, it is not competent for the defendant to avoid it, by pleading that it was obtained by fraudulent misrepresentations made by the plaintiff.

Where pleas are offered on setting aside an office-judgment, the Court may exercise a sound discretion about receiving them; and should receive none (if objected to,) that do not go to the merits of the action.

These were appeals from the Superior Court of Law for Brunswick county. They were all actions of debt, founded on instruments under seal, on which office-judgments were obtained. In three of the cases, pleas were tendered by the defendants, alledging that the bonds were obtained by fraudulent misrepresentations; but, the Court refused to receive them. In one of the cases of *Wyche v. Macklin*, the defendant pleaded a similar matter of defence, and the plaintiff replied the estoppel of the bond. To this replication, the defendant filed a demurrer. Judgment was rendered in all the cases for the plaintiffs, and the defendants appealed.

Spooner, for the appellants.

Gilmer, for the appellees.

May 7. Judge CABELL, delivered the opinion of the Court.

These four cases depend on principles common to them all. The actions were brought on specialties; and the defendants sought to avoid them by pleas, stating that the obligations had been obtained by fraudulent misrepresentations made by the plaintiffs. But, the circumstances relied on, did not relate to the *execution* of the specialties; they went to shew a want of *consideration* only.

The case of *Taylor v. King*, 6 Munf. 358, is a conclusive authority, that a specialty cannot be avoided in a Court of Law, on such grounds. The judgment in the case of *Wyche v. Macklin*, where this very question was brought before the Court by the demurrer, must, therefore, be affirmed. There is nothing in this opinion, opposed to the decision in *Wormley's ex'r. v. Moffet*, 6 Munf. 120. There the plaintiff waived the estoppel, and joined issue on the fact. He was, therefore, held to be bound by the verdict. But, here he insists on the estoppel, and is entitled to its benefit.

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Wyche,

v.

Macklin.

It is contended, however, by the counsel for the appellants, that the Court below erred in the three other cases, in rejecting the pleas of the defendants; that the proper course was, to receive the pleas, leaving it to the plaintiffs to reply or to demur. But, as these pleas were offered on setting aside the office-judgments, the application was addressed to the sound discretion of the Court. On such occasions, although the Court is to look only to the matter of the plea, it should receive none, (if objected to,) that does not go to the merits of the action; it should reject all that contain no ground of legal defence whatever.

In the case of *Gee v. Malone*, in addition to the plea which states the particular misrepresentations, alledged to have been made by the plaintiff, there is a plea stating, in general terms, that the obligation was obtained by fraud, covin and misrepresentation, by the plaintiff, in collusion with others, and concluding, that the obligation is, therefore, "void in law." The conclusion of this plea shews, that the fraud complained of relates to the *consideration* only; and, therefore, as in the other more special pleas, it is unavailing in a Court of Law.

The judgments, in all the cases, are affirmed.

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TOMPKINS v. MITCHELL.

A. and B. are joint purchasers of real property. They give their notes for the payment of the purchase money, and receive a conveyance from the vendor. B. becomes insolvent, and A. pays more than a moiety of the purchase money. A. has a lien on the property to reimburse him that he has paid above one moiety of the purchase money, in preference of the creditors of B. claiming under a deed of trust from B., unless they appear to be purchasers without notice.

This was an appeal from the Chancery Court at Richmond. The facts of the case will be explained, as far as necessary, in the following opinion.

Nicholas, for the appellant.

No Counsel, for the appellee.

May 12. Judge CARR, delivered the opinion of the Court.*

This is an appeal from a dissolved injunction. *Mitchell* and *Tompkins* purchased jointly the land in question. For the purchase money, (\$7,200,) three negotiable notes were given, executed by *Tompkins*, and endorsed by *Mitchell*. The vendor took no other security. A deed was executed to the vendees jointly. *Mitchell* failed; and *Tompkins* had to pay two of the three notes, making \$1,200 beyond his moiety of the debt. He also made some permanent improvements, and, as *Mitchell* alledges, received the rents. *Mitchell*, on his failure, conveyed to trustees, for the benefit of his creditors. The bill was filed to stay these trustees from selling *Mitchell's* interest in the land, and to subject that interest to the reimbursement of *Tompkins*, for the excess of the purchase money paid by him. The Chancellor dissolved the in-

* Judge CARR, absent.

junction, and dismissed the bill, on the ground, that the vendor, having retained no lien, legal or equitable, the plaintiff could acquire none by paying money for *Mitchell*; and, therefore, could only be considered as a simple contract creditor. On this point, this Court differ materially from the Chancellor. They consider it settled law, that the vendor has a lien on the estate, for the purchase money, while in the hands of the vendee, volunteers, or purchasers with notice: that *prima facie*, the purchase money is a lien on the land; and it lies on the purchaser to shew, that the vendor agreed to rest on other security: that, taking a note for the payment of the purchase money, does not affect the vendor's lien; and, if part be paid, the lien is good as to the residue, and the vendee becomes a trustee as to that which is unpaid. For the doctrines, we refer to the cases of *Austen v. Halsey*, 6 Ves. 489; *Nairn v. Prosser*, 1b. 759, 760; *Mackreth v. Simmons*, 15 Ves. 328; *Hughes v. Kearney*, 1 Sch. & Lefr. 192; *Blackburn, &c. v. Gregson, &c.*, 1 Bro. 420; *Sugden's L. of V.*, ch. 12, 352; 1 *Johns. Ch. Rep.* 308; *Wilcox v. Calloway*, 1 Wash. 38; *Cole v. Scott*, 2 Wash. 141; *Graves v. M'Caul*, 1 Call, 414; *Duval v. Bibb*, 4 Hen. & Munf. 113. Under these authorities, we think it clear, that in the case before us, the vendor did retain a lien on the land; as he took nothing but the notes of the purchasers for the purchase money. It is a settled rule, that a surety is entitled to every remedy which the creditor has against the principal debtor, to enforce every security; in short, to stand completely in the place of the creditor. *Parsons v. Briddock et al.*, 2 Vern. 608; 2 Ves. 622; 2 Meriv. 437; 1b. Ves. 412; *Wright v. Morley*, 11 Ves. 22; 14 Ves. 162; 1 *Johns. Ch. Rep.* 412; 2 *Johns.* 554; 4 *Johns.* 130; *Tinsley v. Anderson*, 3 Call, 329; *Eppes v. Randolph*, 2 Call, 125; *Hatcher's adm'r. v. Hatcher's ex'r.*, 1 Rand. 53. As between themselves, and in relation to each other, we consider *Tompkins* and *Mitchell*, each a principal debtor for one-half of the purchase

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money, and a surety for the residue; and *Tompkins*, having paid \$1,200 of the debt for which *Mitchell* was principal, stands, as to that amount, in the place of the creditor, and has a right to enforce his equitable lien on the land. Nor does it affect this right, that the land has been conveyed by *Mitchell*, (if, indeed, it has been so conveyed,) for the benefit of his creditors; because, the trustees are purchasers with notice. This is a necessary conclusion, as they are all before the Court, (one by answer, the rest by decrees *nisi*,) and notice is not denied; the rule being, that he who claims protection as a purchaser without notice, must deny notice by answer, though it be not charged in the bill. In truth, if this were not so, the title of the trustees could not stand in the way of this doctrine; as the allegation in the answer, of title in them, is put in issue, and no deed to sustain it appears in the record. The position, that a surety is entitled to enforce the equitable lien of the vendor, rests upon the doctrine of substitution, or *subrogation*, as it is called in the civil law; (by which the surety becomes, in effect, the actual creditor;) and this doctrine does not conflict with those cases which say, that the lien of the vendor is not extended to third persons. *Coppin v. Coppin*, 2 P. Wms. 291; *Pollexfen v. Moore*, 8 Atk. 272; *Sug. L. of V.* 358-9. These cases mean only, that the purchased estate and the personal estate will not be marshaled; in other words, that the equitable rule which says, that he who has two securities shall not so use them, as to defeat him who has but one, does not extend to the equitable lien; and even this doctrine is strongly shaken by the late decisions, especially by Lord ELDON, in the great case of *M'Keth v. Simmonds*, 15 Ves. 329, and the cases there cited.

The decree of the Chancellor, therefore, dismissing the bill, is erroneous, and must be reversed; and the cause sent back, with directions, that an account be taken of the sum paid by the plaintiff, beyond his proportion of the purchase money, as also of the permanent improvements

put by him upon the land, together with the rents and profits he has received; and that the rents and profits be set off against the permanent improvements; that the balance be set off against the excess of the purchase money, and interest thereon paid by the appellant beyond his moiety; that, for the said excess of purchase money, or so much as may remain after this deduction, with interest thereon, the plaintiff has a *lien* on *Mitchell's* proportion of the land; and, unless the sum thus found due to him, be paid by some one of the defendants, within six months after pronouncing the decree, that *Mitchell's* part of the property be sold for the purpose of paying the same.

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Thompson

Mitchell.

HARRIS v. HARRIS.

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In an action on the case, the proof of the contract must conform to the contract laid in the declaration.

This was an appeal from a judgment of the Superior Court of Law for Nelson county, affirming a judgment of the County Court.

William B. Harris instituted an action of *assumpsit* in the County Court of Nelson, against *Edward Harris*. The declaration contained three counts. The first stated, that the plaintiff and a certain *John L. Harris* being partners in a store, under the firm of *John L. Harris & Co.*, and a dissolution of the partnership being mutually proposed, the said *John L. Harris* afterwards agreed to purchase of the plaintiff; and the plaintiff, at the special instance and request of the said *John L. Harris*, and the defendant, agreed to sell, and did actually sell him, at a price stipulated and agreed upon between them, all the

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Harris

right, title, and interest, which he the said plaintiff had in and to the said goods, wares, and merchandize, credits and other property of the said firm of *John L. Harris & Co.*; and, in consideration thereof, the defendant undertook for the said *John L. Harris*, and faithfully promised the plaintiff that the said *John L. Harris* should exonerate him, the plaintiff, from the payment of all debts at that time due, or which might thereafter become due, on account of the said firm of *John L. Harris & Co.* But, the plaintiff avers, that the said *John L. Harris* has not exonerated him from the payment of all debts which, at the time of the promise and undertaking aforesaid, were due, or might thereafter become due, on account of the said firm of *John L. Harris & Co.*, but has hitherto failed and neglected to do so; in consequence whereof, the plaintiff hath been obliged and compelled to pay the sum of ———, in discharge of a judgment rendered upon a bond bearing date the 13th day of February, 1817, and executed by the plaintiff and defendant to a certain *Robert S. Moon*, for and in consideration of a debt due from the said firm of *John L. Harris & Co.*, conditioned for the payment of \$766 48; which bond was afterwards assigned to one *Jacob Moon*.

The second count states, that the defendant was jointly interested with the plaintiff in a certain mercantile establishment, known and conducted under the name of the store of *John L. Harris & Co.*; and the plaintiff, afterwards, at the special instance and request of the defendant, bargained and sold to the said *John L. Harris* (for the benefit of the defendant, as well as for the said *John L. Harris*, the said *Harris* and the defendant being partners, and jointly interested in the said purchase from the plaintiff,) all the right, title, and interest, which he the plaintiff had, in and to the said mercantile establishment, to wit: the goods, merchandize, credits, and other property, of the said firm of *John L. Harris & Co.*; and, in consideration thereof, the defendant undertook, and faith-

fully promised the plaintiff, to exonerate him from the payment of all debts then due, or which might thereafter become due, on account of the said firm of *John L. Harris & Co.* The plaintiff then avers the same breach as in the first count.

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The third count is a general count of *indebitatus assumpsit* for goods, wares, and merchandize, sold to the defendant, money lent and advanced, and paid, laid out and expended, for the defendant.

The defendant pleaded *non assumpsit*, and issue was joined.

On the trial, the defendant filed a demurrer to the evidence of the plaintiff, to the following effects: One witness for the plaintiff proved, that *William B. Harris* and *Edward Harris*, in a conversation between them, spoke of a partnership that was in contemplation, at *Bridgewater's* store-house, in the county of Nelson: that the witness understood from them that they were to put in a stock of about \$1,000 each: that the store was afterwards established at the place aforesaid, and was attended by *John L. Harris* and *Robert S. Moon*: that *Edward Harris* and *William B. Harris* were frequently at the store; and they seemed to take an interest, and act as proprietors in the store; but whether as partners or not, was not known: that *William Moon*, the father of *Robert S. Moon*, was seen engaged in marking goods: that the mercantile business was to be conducted, and was conducted, in the name of *Harris, Moon & Co.*: that the witness understood, from the conversation before alluded to, between *William B. Harris* and *Edward Harris*, that *John L. Harris* was to be sent for from Richmond; but, if he did not come, *Benjamin D. Harris*, another son of *Edward Harris*, was to manage the business; but, the store was to be established at any event: that, at this time, *John L. Harris* was under age, between eighteen and nineteen years old.

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Another witness, (*Bridgewater*,) stated, that *William B. Harris* and *John L. Harris* applied to him to rent his store-house, but did not rent it; that afterwards *John L. Harris* declined taking the house, and *William B. Harris* desired him to retain the house for some time; that he did retain it, and at a subsequent time, *William B. Harris* and *Edward Harris* came to him, and leased the house of him, to open a store; but, who were to open it, he did not know; that it was stated that *John L. Harris* was to be sent for from Richmond; but, if he should not come, the store was to be established at any event. The witness supposed that *Edward Harris*, the father of *John L. Harris*, was renting the house for his son, until he came, but, if he did not come, that *Edward Harris* would carry on the business; that *John L. Harris* did come before any goods arrived; that sometimes, when *Edward Harris* was drinking, he would say he was a partner, but when he became sober, he would not say any thing about it; that the business was so managed, that the witness could not say that *Edward Harris* was a partner; but he heard *Edward Harris* and *William B. Harris* say, that if *John L. Harris* did not come from Richmond, and they could not get *Robert S. Moon*, *Benjamin Harris* and some other person were to manage the business; that the business was conducted under the firm of *Harris, Moon & Co.*

Robert P. Shelton states, that he is a subscribing witness to a paper in the following words: "For, and in consideration of the sum of twenty-two hundred dollars, payable agreeable to time stipulated, in bonds this day executed, I have sold unto *John L. Harris* my entire right, title and interest in the store of *John L. Harris & Co.*; said *Harris* exonerating me from the responsibility that would have devolved from the contracting of any debt or debts now due, or that may become due, on account of said firm; as also, from the payment of all goods charged me on the books of the late concern. In testimony whereof, I have

hereunto annexed my hand and seal this 28th day of February, 1818.

WM. B. HARRIS, (*Seal.*)
EDWARD HARRIS.

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Witness,

ROBERT P. SHELTON.

Witness,

JOSEPH C. ROBERTS."

That the first firm was *Harris, Moon & Co.*, and the firm that succeeded was *John L. Harris, & Co.*; that after the written contract aforesaid, he heard *John L. Harris* say, he had no doubt *William B. Harris* considered a debt due to *Moon*, was included in the contract; but he, *John L. Harris*, had him fixed otherwise. *John L. Harris* told the witness, that *William B. Harris* and *Edward Harris* owed the debt to *Moon* for his interest. The witness heard *Edward Harris* say, he had not made *John L. Harris* a right to one single cent; that he heard *Edward Harris* say, that he would give bond and security that no debt should come against *William B. Harris*, concerning the business of the store; that *Edward Harris* said frequently, that he had as much right as *William B. Harris*, to the store.

Joseph C. Roberts states, that he was a subscribing witness to the paper above mentioned; that *William B. Harris* had been talking about a debt to *Moon*, when *Edward Harris* said he would give security that no debt should come against *William B. Harris*, on account of the firm of *John L. Harris & Co.*, and signed the aforesaid paper.

There were several other witnesses examined nearly to the same purport as the foregoing. The record of the suit between *Jacob Moon*, assignee of *Robert S. Moon*, against *Edward* and *William B. Harris*, was also introduced; and the evidence of *Moon's* attorney, proving the payment of the money, in satisfaction of the said judgment.

The plaintiff joined in demurrer; and the jury found a conditional verdict for \$ 766 48 cents damages, with legal

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interest, &c., if the law be for the plaintiff upon the first or second count of his declaration; but, if upon the third count only, they found for the plaintiff the sum of \$ 383 24 cents damages, with legal interest, &c.; but, if the law be for the defendant, they found for the defendant.

The Court gave judgment for the plaintiff on the first and second counts of the declaration, and that the plaintiff should recover \$ 766 48 cents, with interest, &c.

Upon an appeal to the Superior Court, the judgment of the County Court was affirmed. From which judgment, the appellant in the Court below, (the defendant in the County Court,) appealed to this Court.

Leigh, for the appellant.

Wickham, for the appellee.

May 13. Judge GREEN, delivered the following opinion, in which the other Judges concurred.*

Admitting that the instrument of writing, under date of February 28, 1818, signed and sealed by *William B. Harris*, and signed by *Edward Harris*, was an engagement on the part of *Edward Harris*, either that he would indemnify, or that *John L. Harris* should indemnify *William B. Harris*, against all responsibility for debts due, or to become due, on account of the firm of *John L. Harris & Co.*, yet it seems to me, that the evidence does not support either the first or second count in the declaration. If, at the time of entering into that writing, the firm of *John L. Harris & Co.* consisted, as is alledged in the first count, of *William B. and John L. Harris*, then the debt in question, due to *Moon*, was not due from *John L. Harris & Co.*, on account of that company. It was originally due from *William B. and Edward Harris*, and

* Judge GABELL, absent.

there is no evidence to shew that it had ever devolved upon, or been assumed by, *William B. and John L. Harris*, trading under the firm of *John L. Harris & Co.*; so that *Edward Harris's* stipulation aforesaid, did not extend to it.

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Harris.

If, as is alledged in the second count, *William B. Harris* and *Edward Harris* were partners, trading under the firm of *John L. Harris & Co.* (which I think a jury might reasonably infer from the evidence,) then *Edward Harris's* stipulation aforesaid, extended to indemnify *William B. Harris* against this debt. But, that stipulation was entered into, upon consideration that *William B. Harris* would sell, and did sell, his interest in the firm, to *John L. Harris*; and not upon the consideration, as is alledged in that count, that the plaintiff sold his interest to *John L. and Edward Harris*; so that the contract proved, is not that laid in the declaration.

Upon the third count, for money advanced and paid by the plaintiff for the use of the defendant, the plaintiff is entitled to a judgment for a moiety of the debt, for which the parties were jointly liable, and all of which was paid by the plaintiff. The judgment should, therefore, be reversed, and judgment given for the lesser sum found by the jury.

I wish this could have been otherwise; for, it is apparent that the debt in question was intended to be embraced by the guarantee, and that *John L. Harris* meditated a fraud upon the plaintiff, from the beginning.

Judgment reversed.

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BRYCE v. STEVENSON and others.

Where an executor, who has been permitted to qualify without security, brings a suit in Chancery to reduce into possession the funds of his testator, the Court may, in its discretion, require security, before it will lend him its aid.

An appeal from the Fredericksburg Chancery Court.

Previous to the marriage of *John Bryce* and *Louisa B. Care*, the latter secured, by a settlement duly made, all the property of which she was possessed, to her own separate use and enjoyment during the coverture, with a power to dispose of the same, (if she should die before the said *Bryce*,) as she might, by her will or writing, direct. *Stevenson* and *Walker* were trustees, and parties to the said deed of settlement. The marriage took place; and *Louisa Bryce* afterwards died in the life-time of her husband, leaving an infant daughter called *Sarah C. B. Bryce*. She bequeathed, by a nuncupative will, all her estate, (with a few exceptions,) to her daughter; but permitted her husband to remain in possession of it, during his life, without giving security. In the event of her daughter dying in the life-time of *Bryce*, without issue, she gave her estate to her sisters.

This will was proved in the proper Court, and *Bryce* was permitted to qualify as executor, under the will, *without giving security*.

The trustees received a part of the trust fund; and *Bryce*, as executor of his late wife, required them to deliver up her estate to him. But, the trustees refused to do so, without a decree of the Court of Chancery, sanctioning that proceeding. A bill was filed by *Bryce* to obtain such a decree, making *Stevenson*, *Walker*, and the infant daughter of *Bryce*, by her guardian *ad litem*, defendants.

The Chancellor decreed, that the defendants, *Stevenson* and *Walker*, should deliver to the plaintiff, for the use of the infant defendant, the bank stock and bonds admitted by them to be in their hands, *upon the plaintiff's enter-*

ing into bond, with sufficient security, in a penalty 1824.
 equal to double the amount of the said bank stock and *May.*
 bonds, with condition to account to the said infant for *Bryce*
 the same, and the profits thereof, when she shall attain *v.*
 the age of twenty-one years, or, if the said Bryce should *Stevenson*
 die before that period, on his death to account with her *and others.*
 qualified guardian, for the bank stock, bonds, and the
 profits thereof.

The plaintiff appealed.

Leigh, for the appellant.

No Counsel, for the appellee.

May 14. The PRESIDENT, delivered the opinion of the Court.

The Court is of opinion, that although the appellant claims the possession of the property in question, in the character of a qualified executor without security, the decree of the Chancellor, imposing terms on him, was correct; nor is it in conflict with the judgment of the Court of Probat, which could only be set aside in an appellate Court. It is the peculiar province of a Court of Chancery, to take care of the estates of infants; and, though the Court of Probat, under the influence of the will, and of the 22d section of the act reducing into one the several acts concerning wills, thought proper to admit him to qualify as executor, without security, yet the Court of Chancery, in the exercise of its peculiar jurisdiction, under the circumstances of the case, rightfully withheld its aid, unless the property of the infant was secured on the terms stated in the decree.

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CLEEK v. HAINES.

It seems, that if a man is prosecuted without probable cause, for stealing a deed, as for a *larceny*, his proper action for redress, is *trespass*, and not *trespass on the case*.

But, if he should bring *trespass* on the case instead of *trespass*, and a verdict is found for him, the error cannot be taken advantage of, in arrest of judgment; the error being cured by the statute of *jeofails*.

Though the *verdict* was rendered before that section of the statute took effect, yet, if the *judgment* was rendered *after* the section had begun to operate, the error will be cured.

Haines brought *trespass* on the case, in the Superior Court of Law for the county of *Scott*, against *Cleek*. The declaration charges, that the defendant had, without reasonable or probable cause, accused the plaintiff before a Justice of the Peace, of having feloniously taken a *certain deed for the conveyance of land* from one *George Cleek*, and causing and procuring the said Justice of the Peace to issue a warrant against the said plaintiff, by which the plaintiff was arrested and imprisoned, until he was further examined and discharged by a Justice of the Peace.

The defendant pleaded not guilty, and issue was joined. On the trial, the jury rendered a verdict for the plaintiff, and assessed his damages to \$240.

The defendant then moved in arrest of judgment for the following reasons: 1st. Because the plaintiff, in his declaration, had set forth no cause of action. 2dly. Because, by the plaintiff's own shewing, he could not recover in this action; *trespass* and not *case* being the proper action.

The Court gave judgment for the plaintiff, and the defendant appealed.

Leigh, for the appellant, contended, that stealing a deed of land, was not *larceny*. For this position he referred to 1 *Hawk. P. C. c. 33, § 22*; 4 *Black. Com. 234*; *Rex v. Westbeer*, 2 *Stra. 1133*. If this is correct, the prosecution for *larceny*, which the plaintiff alledges to have been

instituted, was illegal and void, even on its face. Under these circumstances, an *action on the case* would not lie, but *trespass* was the proper remedy. The distinction is, that where a prosecution is instituted for an offence that is punishable in that mode of proceeding, the defendant may bring *case*. But, if a party is prosecuted for *felony*, for an act that does not amount to *felony*, there his only remedy is *trespass*. These doctrines are completely justified by the opinion of Lord MANSFIELD, in the case of *Johnstone v. Sutton*, 1 T. R. 544; *Morgan v. Hughes*, 2 T. R. 255.

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Clerk
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The new clause in the act of *Jeofails* does not apply to this case. 1 *Rev. Code*, 511, § 103. That clause went into operation on the 1st of January, 1820. The issue was joined in this case, in April, 1818. The trial, verdict, and motion in arrest, were all in September, 1819, and the judgment was rendered in April, 1820. So that the *verdict* was rendered under the old law: and the *judgment* only was rendered after the new one went into operation.

May 15. The PRESIDENT, delivered the opinion of the Court.*

This case is within the letter of the section of the act of *Jeofails*, applicable to it; the judgment having been rendered after that section took effect, though the verdict was before; and the Court is of opinion, that it is within the mischief intended to be provided against also. Damages equivalent to the injury complained of, can only be recovered, either in the action of trespass, or trespass on the case. A construction of the act of *Jeofails*, therefore, which will comprehend this case, cannot affect any substantial right of the defendant. He might have demurred to the declaration before the section of the act alluded to

* Judge COALTER, absent.

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went into operation, if his counsel had thought proper. Having failed to do so, and the merits having been as fairly tried in this form of action, as if it had been trespass, and not trespass on the case, the act of *Jeofails* ought not to receive a construction that would now permit him to avail himself of the advantage of a demurrer. It is not, therefore, material to decide, whether the plaintiff has mistaken his action or not. On that point, the Court is inclined to the opinion, that the proper action was trespass, and not trespass on the case.

The judgment is to be affirmed.



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MOORE and M'CLUNG v. FITZWATER.

Where two parties claim title to lands, and they compromise the dispute, by one party paying a sum of money, and the other conveying the land with warranty, such agreement will be binding, if there be no fraud or imposition in obtaining the agreement.

This was an appeal from the Greenbrier Chancery Court.

The controversy related to a body of land on Gauley river, which *Moore* and *M'Clung* had located. *Fitzwater* located land on the north-western side of the same river, supposing that *Moore* and *M'Clung's* patent only extended to the south side of the river; and supposing himself to be lawfully entitled to the land on the north-western side, sold one hundred acres of it. *Moore* and *M'Clung* afterwards claimed the said land on the north-western side, as being included in their patent; and made a proposition of compromise to *Fitzwater*; and the latter agreed to purchase the 400 acres in question, at a dollar per acre. Accordingly, he executed penal bills, for \$400;

\$ 300 of which, he afterwards paid; and the remaining 1824.
\$ 100 were recovered by judgment.

The bill was filed by *Fitzwater* to injoin the \$ 100, last *May*.
mentioned, and to recover back the \$ 300 that he had ac- *Moore, &c.*
tually paid; alledging, that *Moore* and *M'Clung* had no *v.*
title to the lands on the north side of *Gauley* river: that *Fitzwater*.
his ignorance was imposed upon by *Moore*, to induce him
to make the compromise: that he was at a considerable
distance from any counsel whom he could consult; and
that the compromise was obtained by fraud and imposi-
tion.

The injunction was granted.

Moore answered, stating, that the land in question was
included within his grant: that he sold 400 acres, as above
alledged, to the complainant; and paid one-fourth of the
money received to *M'Clung*, who was entitled to that
proportion for locating and directing the survey. He de-
nies any unfair dealing, or attempt to deceive the com-
plainant, or any other person; and affirms that he sold the
land for less than half its value.

M'Clung answered to the same effect.

Depositions were taken; and, at the hearing, the Chan-
cellor decreed, that the injunction should be made perpetual:
that the contract entered into between the parties should be
cancelled; and that *Moore* should pay to the complainant
\$ 300, with interest, &c.

The defendants appealed.

Wickham, for the appellants.

Nicholas, for the appellee.

May 20. Judge CABELL, delivered the opinion of the
Court.*

* Judge COALTER, absent.

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 Moore, &c.
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 Fitzwater.

The Chancellor seems, from his written opinion in the record, to have thought this case distinguishable from the case of a doubtful title. But, we see no ground for such an opinion. The contract between the parties is not to be considered less a compromise, because it terminated in an agreement, that one party should convey the land with warranty, in consideration of money to be paid by the other; for, that frequently occurs in compromises of contests about the title to lands. *Moore* and *M'Clung* claimed the land by patent, bearing date in 1795, and *Fitzwater* claimed it by patent, dated in 1800. He had sold a part thereof, as his own, for valuable consideration; and was in actual adverse possession of the residue, at the time of the contract. Although it is alledged by *Fitzwater*, that he was induced to enter into the contract by fraudulent misrepresentations on the part of *Moore* and *M'Clung*, and by an ignorance of his own rights, yet, the allegation as to the fraud is denied by the answer, and unsupported by testimony; and it is apparent, that every important fact, necessary to the formation of a correct opinion as to the title, was known to both parties, at the time of entering into the contract; and *Fitzwater*, with this full knowledge, agreed to purchase the land from *Moore* and *M'Clung*, at a price far less than its value. He subsequently expressed to several persons, his satisfaction at the bargain he had made; and, about two years afterwards, he paid to *Moore* three-fourths of the purchase money, without objection. Whether the title, at the time of the contract, really was in the appellants or the appellee, we do not deem it material to enquire. It is sufficient that the parties themselves have settled the question; and as there was no fraud, or undue advantage, we would not now disturb it, even if assured that *Moore* and *M'Clung* had no title. In the case of *Penn v. Lord Baltimore*, 1 Vesey, 444, Lord HARDWICKE said: "The settlement of boundaries, and peace and quiet, is a mutual consideration on each side, and in all cases, make a good consideration to sup-

port a suit in this Court, for settling boundaries." In 1824. *Cann v. Cann*, 1 P. Wms. 727, Lord MACCLESFIELD ^{May.} said: "Where two parties are contending before this Moore, &c. Court, and one releases his pretensions to the other, there ^{v.} Fixwater. can be no color to set aside this compromise, because the man that made it had a right; for, by the same reason, there can be no such thing as compromising a suit, nor room for any accommodation; every release supposes the party making it to have a right, but this can be no reason for its being set aside; for, then every release might be avoided." In *Stapleton v. Stapleton*, 1 Atk. p. 10, Lord HARDWICKE said: "An agreement entered into, upon the supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for, the right must always be on one side or the other; and, therefore, the compromise of a doubtful right is a sufficient foundation for an agreement." That the question of the *right* in this case was *doubtful*, the Chancellor himself has declared; and we think with him, that it is also a *difficult* one.

The decree is to be reversed, and the cause remanded to the Court of Chancery, where the injunction is to be dissolved, so soon as a deed for the land shall be made, pursuant to the contract between the appellants and the appellee.

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JENKINS v. HURT's Commissioners.

An instrument concluding "witness our hands," with a scroll annexed to the signature, and the word "seal" written therein, is only a simple contract.

If such instrument is in the form of a penal bill, the plaintiff should declare for the principal sum, and not the penalty.

In a joint action upon contract, the plaintiff must have judgment against all the defendants before the Court, or he can have judgment against none.

If errors in the pleadings or proceedings, are cured by the statute of *Joefails* as to one defendant, they are cured as to all the defendants.

Jesse Hughes and others, commissioners of *Judith Hurt*, deceased, brought an action of debt in the County Court of Prince Edward, against *Jenkins* and *Young*. The declaration was founded on "a certain writing signed with the proper hand-writing of the said defendants, concluding 'witness our hands,' with a scroll annexed, and the word 'seal' written therein," by which they bound themselves, their heirs, &c. in the penal sum of \$2,228, to pay to the plaintiffs the sum of \$1,114, twelve months after the date of the instrument, to wit, on the 26th day of December, 1819. The declaration then alleges the default of the defendants to pay on the day appointed, whereby an action had accrued to demand and have the said sum of \$2,228.

Jenkins appeared and pleaded payment. An office judgment was entered against *Young*, who did not appear. *Jenkins* then relinquished his former plea, and the Court rendered judgment against him for \$2,228, the penalty in the writing, to be discharged by the payment of \$1,114, with interest, &c.

From this judgment, *Jenkins* appealed to the Superior Court of Law for Prince Edward County; where the judgment was affirmed. He then appealed to this Court.

Leigh, for the appellees.

May 22. Judge GREEN, delivered the opinion of the Court.*

* Judges COALTER and GABELL, absent.

The paper which was the foundation of the action in this case, was a simple contract. The declaration, therefore, should have claimed according to the legal effect of the contract, that is, the principal sum, and not the penalty; and should have noticed the penalty, only by way of describing the instrument sued upon. The defendant *Jenkins*, having appeared and pleaded, and afterwards waived his plea, this fault in the declaration, which might have been demurred to for that cause, is cured by the provisions of the statute of *Jeofails*, which took effect on the 1st day of January, 1820; and being cured as to *Jenkins*, is cured as to the other defendant. The terms of the statute are general: "No judgment, after the verdict of twelve men, shall be staid or reversed, &c.; nor shall any judgment, entered by *nil dicit* or *non sum informatus*, be reversed, nor a judgment, after enquiry of damages, be stayed or reversed, for any omission or fault, which would not be a good cause to stay or reverse the judgment, if there had been a verdict." In a joint action upon contract, the plaintiff must have judgment against all the defendants before the Court, or he can have judgment against none. If, therefore, one of the defendants, who had suffered judgment by default for want of appearance, could, notwithstanding a verdict against another defendant, alledge errors in the proceedings, for arresting or reversing the judgment against him, which would have been cured by a verdict against him, it would have the effect of arresting or reversing the judgment as to the other party also, against whom there was a verdict; and so the provision of the statute would be frustrated. The consequence is, that if the statute of *Jeofails* operates as to one of the defendants, it operates as to the others also, although they may be in default for want of appearance. This was the construction given in England to the statute of 18 *Eliz.* ch. 14, § 1, which provides, "If any verdict of twelve men or more shall be given, the judgment thereupon shall not be staid or reversed, for want of any writ, original or judicial, &c." In trespass against

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commissioners.

1824: three, one pleaded not guilty, upon which they were at
 May. issue, and the defendant had a verdict. There was judg-
 Jenkins ment by default against the other two, and a writ of en-
 v. quiry; and *they* only brought a writ of error, and assign-
 Hurt's ed for error the want of an original, and that this is not
 commis'sers. cured by the verdict *for the one defendant; but if the
 verdict had been for the plaintiff against the one defen-
 dant, this had been aided by the statute; for the want
 of an original quoad all, is cured when any verdict is
 for the plaintiff;* and the other two may bring a writ of
 error without the third, for he cannot be joined, because
 he is acquitted, and therefore cannot say that the judgment
 is to his damage. And so held all the Court, except
Twisden; who held that the writ of error should be brought
 by all three. *Cannon v. Abbott*, 3 Lev. 210; cited in
Vin. Abr. Amendment, N. pl. 1, n.

The plaintiff was, therefore, entitled to a judgment,
 such as the very right of the case would have warranted;
 that is, a joint judgment against both of the defendants,
 for the principal sum and interest due upon the note.

The judgment of the Superior Court should be reversed
 with costs. And this Court giving such judgment as the
 Superior Court ought to have given, the judgment of the
 County Court against the defendants severally, should be
 also reversed with costs, and a joint judgment entered
 against both the defendants, for the principal sum due by
 the note, and interest thereon from the 26th day of Decem-
 ber, 1819, and the costs of the County Court, &c.

SMITH v. MARKS.

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A mechanic who contracts to build a house, and after performance of the work, claims a balance due to him after crediting several partial payments, cannot bring a suit in equity, but must sue at law.

The true meaning of *account*, which will give a Court of Equity jurisdiction.

A plaintiff who has been guilty of a fraudulent act, is not entitled to the countenance of a Court of Equity.

Smith filed his bill in the Hustings Court of Richmond, to recover of *Marks*, a balance of money due him for building a house under a contract with *Marks*. After stating the terms of the contract particularly, and averring the performance on his part, he admitted that he had received some partial payments, and claimed the balance still due. He further alledged, that *Marks* had obtained from him a certificate, which was necessary to support his credit at the Bank of Virginia, that he was not indebted to him on account of the contract aforesaid. *Smith* at first hesitated; but, after great importunity from *Marks*, and his repeated assurances that the certificate should have no operation on the future settlement of their accounts, he, (*Smith*), from kindness to *Marks*, gave the certificate. But, he alledged, that he apprehended that *Marks* intended to use it to his injury.

Marks answered, stating, that *Smith* had not performed his contract in a proper manner; that as to the certificate, he denied that he told *Smith* what he wanted it for; that it was, in truth, to satisfy a gentleman of the state of accounts between himself and *Smith*; but it was not so used, &c.

The deposition of *Henry Banks* stated, that he was applied to by *Marks* to draw such a certificate as that stated in the bill, and that *Marks* informed the deponent that it was to be submitted to the Bank, to counteract some reports injurious to his credit; that the deponent accordingly drew such a paper; that a short time afterwards, *Smith* applied

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to the deponent to institute an action against *Marks* on account of the contract above-mentioned; and the deponent, recollecting the certificate, informed *Smith* that the paper which he had given to *Marks* might be used in a suit at law, to defeat his claim; and told him that he had no alternative but to sue *Marks* in Chancery, &c.

The Court of Hustings decreed in favor of *Smith*, and *Marks* appealed to the Court of Chancery. That Court reversed the decree of the Hustings Court, and dismissed the plaintiff's bill. From this decree the plaintiff, *Smith*, appealed to this Court.

Daniel, for the appellant.

Wickham, for the appellee.

May 24. Judge CARR, delivered the opinion of the Court.*

This is a bill filed by a carpenter, against his employer, to recover the balance due him for building a house. The dimensions of the house, the manner in which the work was to be done, the sum to be paid, and the days of payment, are stated in a written contract between the parties, filed with the bill. Has equity jurisdiction in such a case? It is claimed on two grounds: 1st. Because this is matter of account, and account is a settled head of equitable jurisdiction. 2d. Because the certificate, given by the plaintiff to the defendant, impedes his course at law, and, therefore, equity ought to entertain him.

For the assertion, that account is a head of equity, authority may be found in several elementary writers, and books of practice. But, the position is not to be taken in that large and comprehensive sense, given to the word *account* in common parlance. To shew this, I will refer

* Judge COALTER, absent.

to a few cases. *Dinwiddie v. Baily*, 6 Ves. 136. The plaintiff, an insurance broker, filed a bill for a discovery and account, of money paid and received by him in that capacity, on account of the defendants, and money due to him for commission, postage of letters, &c., and upon promissory notes endorsed to him; and to restrain an action brought contrary to the universal custom of the business. The defendants put in a general demurrer. Lord ELDON said, "I should feel infinite reluctance in sustaining such a bill." After several other remarks, he adds, "it is not to be said, that in every case where the defendant owes more to the plaintiff, that is a ground for a bill. There must be *mutual demands* forming the ground. The case of dower is always considered a case standing upon its own specialties. So is the case of the steward. The nature of his dealing is, that money is paid in confidence, without vouchers, embracing a great variety of accounts with tenants; and nine times in ten, it is impossible that justice can be done to the steward. If I sustain this bill, there never would be an action in the city against a broker, without a bill in equity. I hesitate, excessively, in permitting such a bill; and the strong inclination of my opinion is, that the demurrer must be allowed. There is hardly a case of set-off, in which a bill might not be sustained, if this may." Time was given to search for precedents; and at a subsequent day, the Chancellor declared; "it was impossible to sustain the bill, without laying down, that wherever a person is entitled to a set-off, he may come in to this Court;" and the demurrer was allowed. This, with the case of *Wells v. Cooper*, decided in the Court of *Exchequer*, seem to be considered as giving the rule. In the latter case, Chief Baron *Eyre* said, if it was only one matter, it could not be the subject of a bill; but, where there had been a series of transactions on the one side, and payments on the other, he was not satisfied that it was not matter of account. In a later case, *Corporation of Carlisle v. Wilson*, 13 Ves. 279, Lord ESKIN lays down

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the doctrine rather more largely. He says, "the principle upon which Courts of Equity originally entertained suits for an account, where the party had a legal title, is, that though he might support a suit at law, a Court of Law either cannot give a remedy, or cannot give so complete a remedy, as a Court of Equity; and by degrees, Courts of Equity assumed concurrent jurisdiction in cases of account; for, it cannot be maintained, that this Court interferes only when *no* remedy can be had at law." He adds, "the proposition is, not that an account may be decreed in every case, where an action for money had and received, or *indebitatus assumpsit* may be brought, but, that where the subject cannot be so well investigated in those actions, this Court exercises a sound discretion in decreeing an account." In *Porter v. Spencer*, 2 Johns. Ch. Rep. 169, the bill stated, that the plaintiffs were merchant tailors, and had sold clothing to the defendant, on a credit of six months; and, that there was a balance due them of \$317 85 cents. The prayer was for a *ne exeat* and account. Chancellor *Kent* said, "to sustain a bill for an account, there must be *mutual demands*, and not merely payments by way of set-off. A single matter cannot be the subject of an account. There must be a series of transactions on one side, and payments on the other."

Apply to the case before us, any of the tests established by these authorities, and it will be seen at once, that equity has nothing to do with it. There must be *mutual demands*. No such thing here; but, on one side, a demand for work and labor; on the other, payments and set-offs alone. "A single matter cannot be the subject of an account;" there must be a series of transactions. Here, the building of the house is the single matter which gives rise to the whole controversy. The principle of interference is, that Courts of Law either cannot give a remedy, or cannot give so complete a remedy as equity. In the case before us, I think, a Court of Law can not only give a remedy, but a more complete remedy than a Court of Equi-

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ty. It is a simple matter of contract, and work and labor; no want of evidence; no discovery sought. The plaintiff says he has built the house according to contract, and must be paid. The defendant says he has done his work badly; has left it unfinished; has broken his contract; and has received as much as he deserves. Now, this seems to me, a case peculiarly apt for the decision of a jury from the country; men who understand these matters; and who, with the witnesses before them, with counsel to assist, and a Court to superintend the whole, would settle fairly such a matter as this, in one hour. Whereas, in equity, it has been depending nineteen years. The commissioner charges 76 hours, making a fee of \$ 57. The record is stuffed with innumerable depositions; and the costs of the whole cannot be less than \$ 200. Is not this monstrous? And, if we open the door of a Court of Equity to such a case as this, do we not let in every possible contract, which stipulates that something shall be done on one side, and something paid on the other? It is most clear, therefore, to me, that this is not such matter of account, as equity ought to entertain.

Does the certificate give us jurisdiction? This was a paper given by *Smith* to *Marks*, after the building of the house, by which he acknowledged that he had received full satisfaction for the work. If this was true, the plaintiff has no claim. If it was false, he has volunteered his aid to enable the defendant, by his falsehood, deliberately told, to deceive others; and, forgetful of the maxim, that "he who has done iniquity, shall not have equity," would found on this very iniquity, a right to the assistance of an equitable tribunal. The bare statement of the proposition is sufficient; and I am clear, that the decree of the Chancellor should be affirmed.

Decree affirmed.

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DRAGO v. STEAD and others.

The death of one of the demandants in a writ of right before trial and judgment, abates the whole writ; and it is of no importance whether the deceased demandant left a child, or not.

This was a writ of right brought in the County Court of Monongalia, by *Stead's* heirs against *Drago*. The County Court gave judgment for *Stead's* heirs, and *Drago* appealed to the Superior Court of Law for the same county. The judgment was reversed, and the cause retained for trial, by consent, in the Superior Court. In that Court, it was suggested that *Susanna Fryback*, one of the demandants, had died since the institution of the suit; but, the Court decided, that the writ should be abated as to *Susanna*, and proceeded to try the cause, and rendered judgment for the remaining demandants. *Drago* appealed to this Court.

Leigh, for the appellant.

Tucker, for the appellees.

May 28. The PRESIDENT, delivered the opinion of the Court.

It is not material whether, in this case, *Susanna Fryback* died leaving a child, or not, as was at first supposed. It sufficiently appears that she was dead before the trial, and rendition of the judgment of the County Court; and as the law then was, upon the authority of the cases cited in 2 *Saund.* 72, and by this Court, in the case of *Carter v. Carr*, Gilm. Rep. 145, by her death, the writ abated as to all the demandants, and should have been so abated by the County Court. The judgment of the Superior Court is also erroneous, in not rendering such judgment as the

County Court ought to have rendered in this particular. Both judgments are reversed, and judgment is to be entered that the whole writ abate.

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A Sheriff cannot contradict his return, but must obtain leave of the Court to amend it.

When a Sheriff has arrested a defendant and taken appearance bail, and makes a return that the defendant is *committed to jail*, he loses his remedy against the bail on the bail-bond.

This was an appeal from the Superior Court of Law for Halifax County. The case was this:

John Stone brought an action of debt in the County Court of Halifax, against *John Henry*, surviving obligor of himself and *James Ryburn*, on a bail-bond, in which *Henry* became appearance bail for *Ryburn*, in a suit between *Berryman Green* and the said *Ryburn*. *Stone* was the Sheriff of Halifax, who served the writ in the suit of *Green v. Ryburn*, and a bail-bond was executed, as above mentioned, to the said *Stone*, as Sheriff of Halifax, in the penalty of £2,000, for the appearance of the said *Ryburn* on the fourth Monday in November, 1810.

The declaration charges, that the said *James Ryburn* did not appear, before the Justices of the said County, according to the exigency of the said writ, as according to the condition of the said writing obligatory, he ought to have done; but therein totally failed, &c.

The defendant pleaded: 1. Conditions performed. 2. That the said *Ryburn* was arrested at the suit of *Berryman Green*, and was committed to jail for want of ap-

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pearance bail, and was actually in custody of the said Sheriff, on the return day of the said writ; so that the said bond in the plaintiff's declaration set forth, (if it was ever executed,) became a nullity, of no effect, and this he is ready to verify. 3. That a writ issued on behalf of *Berryman Green*, as aforesaid, with an endorsement, that bail was required: that the said writ was delivered to a deputy of said plaintiff *Stone*, to be by him served on the said *Ryburn*, and afterwards returned to the Clerk's office, with an endorsement made by the said deputy, that the said *James Ryburn* was committed to jail; in consequence of which, a conditional judgment was entered against the said *Ryburn*, and the defendant as his common bail; which said conditional judgment, not having been set aside, was afterwards confirmed against *Ryburn*, and the defendant as his common bail: that the defendant afterwards petitioned the Judge of the Superior Court of Law for the County of Halifax for a *supersedeas* to the said judgment and proceedings of the County Court, which was awarded; but the judgment was afterwards affirmed: that the defendant then obtained a *supersedeas* from the Court of Appeals, where the judgment aforesaid was reversed, and judgment entered for the appellant's costs in both Courts; which said judgment remains in full force: that the cause of action set forth in the declaration, is the same identical cause of action, for which the defendant was impleaded in the former suit of *Green v. Ryburn*, and for which a judgment was finally rendered in favor of the defendant, by the Court of Appeals, &c.

The plaintiff demurred generally to the third plea.

As to the second plea of the defendant, the plaintiff replied, that he ought not to be barred from having or maintaining his action, because the said *James Ryburn* was not in custody at the return day of the writ, in the suit of *Green v. Ryburn*; but that he had been discharged from custody, upon the bail-bond being executed by *Ryburn* and *Henry*. The defendant demurred to this plea, assigning causes.

At another day, leave was granted the defendant to withdraw his plea of conditions performed, and he filed an additional plea, to this effect: that after the making of the writing obligatory aforesaid, to wit: on the 4th day of November, in the condition of the said bond above mentioned, the said *Ryburn* appeared before the Justices of the County Court of Halifax, at the Courthouse of the said County, to answer the said *Berryman Green* in the plea aforesaid, according to the form and effect of the condition aforesaid; and this he is ready to verify by the records thereof, in the said County Court of Halifax remaining, &c.

Stone replied, that there is not any such record of appearance by the said *James Ryburn* made before the Justices of the said County Court of Halifax, on record remaining, as the said *John Henry* above, by pleading, hath alledged; and this he is ready to verify, &c.

As to the third plea of the defendant, the plaintiff replied, in effect, that a writ was directed to the Sheriff of Halifax, at the suit of *Berryman Green* against *James Ryburn*, and delivered to the said Sheriff, with an endorsement, that bail was required: that, by virtue of the said writ, the said Sheriff, by his deputy, arrested the said *Ryburn*, and detained him in custody, and committed him to jail: that the said deputy returned the said writ, with an endorsement thereon, that he had executed the same, and that he had committed the said *Ryburn* to jail, for want of bail: that, after the said *Ryburn* had been committed as aforesaid, and before the return-day of the said writ, to wit: on the 29th day of October, 1810, he the said *Ryburn*, did tender the said *Henry* to the said *Stone*, as the surety and bail of the said *Ryburn*, for his appearance, according to the exigency of the said writ, and they executed a bail-bond for that purpose; in consequence of which, he the said *John Stone* discharged the said *Ryburn* out of custody, and permitted him to go at large: that the said *Stone* did afterwards, to wit: on the ——— day of ———, 1810, return and file the said bond in the Clerk's

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office of the said county: that the said *Ryburn* not having appeared, according to the condition of the bond, judgment was rendered against him and the said *Henry*, as his bail, in favor of the said *Berryman Green*, by the County Court of Halifax; which judgment was afterwards affirmed by the Superior Court of Law for the same county; and a *supersedeas* was awarded by a Judge of the Court of Appeals: that the judgments of the County and Superior Courts were reversed, and the Court of Appeals gave judgment, that the Sheriff not having returned that the said *John Henry* was the bail for the appearance of the said *Ryburn*, that the judgment was erroneous as to the said *Henry*; and they gave judgment accordingly against the said *Ryburn* for £130, and costs, &c.; and that the cause of action, set forth in the declaration, is not the same identical cause of action, for which the said *John Henry* was impleaded by the said *Berryman Green*, in his former suit against the said *Ryburn*, and in which a judgment was finally rendered in favor of the said *Henry*, by the Court of Appeals.

The County Court decided, on the first plea above mentioned, (which is called the *additional* plea,) that there was no such record, as the plaintiff, by replying to that plea, had alledged. The Court also decided, that the matters of law arising upon the demurrer filed by the defendant to the replication of the plaintiff to the *second* plea of the defendant, were for the plaintiff; and, therefore, over-ruled the same. To the replication to the *third* plea, the defendant demurred; but, the Court over-ruled that demurrer also, and ordered a jury to be impaneled to ascertain the damages sustained by the plaintiff. The jury rendered a verdict for the plaintiff, for 189*l*. 15*s*., with interest.

The Court gave judgment for the penalty of the bond, to be discharged by the amount of the verdict, and costs.

The defendant appealed to the Superior Court of Law. That Court (by consent,) ordered that the judgment should

be reversed and annulled; and, by like consent, that the verdict, and all the proceedings subsequent to the filing the declaration, be set aside, and the cause remanded to the County Court, to be sent to the rules by that Court, and further proceeded in.

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The same pleadings were had as in the former instance, and the result was the same.* An appeal was again taken to the Superior Court, and the judgment was again affirmed. From this judgment, *Henry* appealed to this Court.

Wickham, for the appellant.

Leigh, for the appellee.

May 31. Judge GREEN, delivered the opinion of the Court.

All the pleadings in this case having been set aside in the Superior Court, by consent, and the cause remanded to the County Court, where the defendant pleaded, and the plaintiff replied *de novo*, our attention is of course confined to this last set of pleadings. The first plea is, that the defendant in the original action, (*Ryburn*,) appeared according to the condition of the bond; which the defendant was ready to verify by the record. Upon this plea, the plaintiff took issue, and it was decided by the Court against the defendant. The third plea states the return by the Sheriff, "that the defendant *Ryburn* was in custody;" and that a copy of the bail-bond was also returned: that, thereupon, a judgment was rendered in the office against *Ryburn*, and the bail, the defendant in this action; which was reversed in the Court of Appeals, and final judgment given for the bail; and relies, that the cause of action, upon which the Court of Appeals pronounced judgment for the defendant,

* For a more particular account of the pleadings, see Judge GREEN's opinion.

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was the same as that now asserted by the plaintiff. To this, the plaintiff replied, repeating, in substance, the facts stated in the plea, and traversing that the two suits were for the same cause of action. The defendant demurred, and the demurrer was rightly over-ruled; for, the judgment of the Court of Appeals, even if given in relation to the same cause of action, was given between other parties, and not being given on the merits of the *contract*. is no bar to this action.

The only real question in the cause, arises upon the second plea, and the replication thereto; to which the defendant demurred. That plea states the suing out of the original writ against *Ryburn*; the demand for bail; the execution of the writ; the commitment of *Ryburn* to jail for want of bail; and the return of the writ by the Sheriff, that *Ryburn* was committed to jail, for the want of appearance bail; and avers that *Ryburn* was, on the return-day of the writ, actually in the custody of the Sheriff, as appears by the record; so that the bond became a nullity, and of no effect; and concluded with a verification.

The plaintiff replied, admitting the suing out of the writ—its execution—the commitment of *Ryburn* to jail, and the return and endorsement of the writ, as stated in the plea; but avers, that after the endorsement on the writ, and before the return-day, the bail-bond was executed, and *Ryburn* discharged from custody; and, that he was not in custody at the return-day of the writ; and concludes to the country. To this the defendant demurred, and assigned for causes of demurrer, that the replication was not a full answer to the plea, and that it was repugnant to the record set forth in the plea.

The reference to the record in this plea, did not make that record a part of the plea. It was equivalent to the usual expression in a plea, stating the effect of the record, as to the point relied on, "as appears by the record;" unless the other party had denied the effect of the record, as stated in the plea, by taking issue thereon; or alledged

that something further appeared by the record, which he relied upon to obviate what was relied upon by the defendant, and upon which new allegation the defendant took issue. It was not competent to the Court, to look into the record referred to in the pleadings, to see if it established any matter which the parties, in their pleadings, had not alledged to exist. In this case, the Court was to determine upon the demurrer, and not whether the record proved what was admitted by the pleadings, or proved something which was not averred by the parties in their pleadings. The record of the suit, referred to in the plea, although copied by the Clerk into the record in this case, cannot be considered properly as any part of this record. The allegation of the plea, "that so the bond became a nullity, and of no effect," is mere surplusage, being a conclusion of law, and not an averment of fact; and the conclusion, "and this he is ready to verify," although imperfect for the want of the addition of the words "by the record," is not so defective as to be objectionable on a general demurrer; although it would be on a special demurrer for that cause. It is virtually an affirmation that he was ready to verify the matter of the plea by the record, as it could be verified in no other way. The case then presented is, that the defendant alledges that it appeared by the record and the Sheriff's return, that *Ryburn* was actually in custody for the want of bail. The replication admits, that it does so appear; but insists, that the return was not true, and was made by mistake; that is, that the endorsement on the writ was true when made, to wit: several days before the return-day; but, that after the endorsement was made, *Ryburn* was discharged upon the bail-bond being given, and the endorsement on the writ not altered; and for this he puts himself upon the country.

The first enquiry then is, whether it is competent to the Sheriff to contradict his own return. It seems to me that he cannot. It is a matter of record to which he is privy; and although he may amend his return, by leave of the

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Court, until it is amended, it must be taken to be true as to the Sheriff himself, who has made the return. This has been decided in the Supreme Court of Massachusetts. *Pennington v. Loring*, 7 Mass. Rep. 388. In that case, in a suit against the Sheriff for selling property without a due notice of the sale, he having returned on the warrant that he had advertised 24 hours, whereas the law required that he should advertise 48 hours; he offered to prove that his return was a mistake, and that, in fact, he did advertise 48 hours. But, the Court unanimously determined, that it was not competent to the Sheriff to give such proof, although it might have been said, that it did not contradict the return. I think the same point has been decided in the Supreme Court of New York. If this be law, then, upon these pleadings, it must be taken that *Ryburn* was in custody at the return-day of the writ; for, that is the legal import of the return stated in the pleadings, and that fact would discharge the bail.

If a defendant be let to bail, and on the return-day of the writ, he surrendered himself in custody, it would discharge the bail. The act of 1645, chap. 14, *Hening's Stat. at Large*, vol. 1, p. 305, prescribes what shall be the substance of the bail-bond, "with condition to bring forth the party arrested, or perform the award of the Court;" and, upon this latter expression it was, that the bail, if he failed "to bring forth the party arrested," was liable to a judgment in that cause, against himself; but, if he brought forth the party, he was discharged. (See the act.) This statute was repeatedly re-enacted, but never repealed until January 1, 1820. If the surrender of the principal in custody on the return-day, would not discharge the bail, then it might happen, that he would have no means of discharging himself. If he lived, he might enter special bail, and so discharge himself as appearance bail. But, if he died before the return-day, judgment might be given against his estate, even if no executor or administrator had qualified; and the principal might not have it in his

power, to prevent such consequence, unless his surrendering himself in custody would have that effect. Such a surrender, though not an appearance, would have the effect of an appearance. See *Rev. Code*, 1792, chap. 67, § 20, 23; chap. 66, § 32.

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But, suppose it were competent to the Sheriff to contradict his return; then, upon these pleadings, the case would be, that the Sheriff, having taken bail and discharged the defendant, nevertheless returned that the defendant was in custody when he was not. The effect of which was, that no judgment could be had, if the defendant failed to appear, either against the principal or bail; and the plaintiff could only proceed, either in the same suit by *alias capias*, or in a new suit against the Sheriff for his false return. And if, in the event of the plaintiff's proceeding against the Sheriff, the Sheriff could maintain his suit upon the bail bond, and the bail were subjected, the latter would have his remedy *after paying the money*, either by action or by motion, under the act of Assembly against his principal. Until the Sheriff had suffered damage from the breach of the condition of the bond, he could not sue upon it, and consequently, the bail could not resort, with any effect, to a bill *quia timet*. If the Sheriff had made a true return, and a judgment had been regularly entered against the bail, he would have been immediately entitled to an attachment against *Ryburn*, and, without the necessity of paying the money, might have had *Ryburn's* property sold, and applied to the payment of the debt for his indemnity. The first act which authorised a judgment against the bail, authorised this attachment against the principal. 1645, 1 *Hen. Stat. Large*, chap. 14, p. 305. These provisions were introduced, both for the benefit of the creditor, and of the bail; and gave the bail a much better chance of indemnity than he before had, by expediting his remedies. This remedy of the bail was utterly frustrated by the Sheriff's false return; and, although other more tedious and uncertain remedies remained to him, and

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although he might have discharged himself from his responsibility of appearance-bail, by taking upon himself the obligations of special bail, yet his situation as appearance-bail may have been preferable to that of special bail, since *Ryburn* may have left the State and left property behind him. But, whether the one or the other situation was preferable, the act of the Sheriff deprived the bail of his election, and varied his situation. His failure to make a true return was, (to use the expression of one of the English Judges,) contrary to the faith of the contract. Nothing is better settled in Courts of Equity, than that any act of the creditor, which deprives the surety of any remedy which he has for his indemnity, discharges the surety. The cases on this subject are referred to in *Norris v. Crummey*, lately decided. If such an act is apparently or manifestly for the benefit of the surety, he is nevertheless discharged; for, he ought to be the sole judge of his own interests, and ought not to be deprived of his legal rights, without his assent. *Samuel v. Howith*, 3 Meriv. 272. These principles of the Court of Equity have been adopted in Courts of Law, and applied to the case of bail. *Moore v. Bowmaker*, 6 Taunt. 379; *Willison v. Whitaker*, 7 Taunt. 53; *Melville v. Glendening*, 7 Taunt. 126; *Rathbone v. Warren*, 10 Johns. Rep. 587.

It is not necessary to enquire, whether the erroneous judgment entered by the Clerk against the bail, as appears by the third plea and replication thereto, ought to have any effect upon the liability of the bail, or his discharge from liability, under the second plea and replication; since that fact cannot enter into the consideration of a plea and replication, in which its existence is not averred. The matter of one plea or replication cannot be considered as incorporated with another. Every plea or replication should be, in itself, a complete bar, or answer to the bar; and every omission or defect, cannot be cured, by reference to other parts of the pleadings.

Nor is it an answer to the proposition, that the bail is discharged by the failure of the Sheriff to make a proper return, (thereby depriving the bail of one of his legal remedies, for his indemnity,) to say, as was said at the bar, that even if the proper return had been made, the bail might have been adjudged insufficient; and thus have lost that remedy, whilst he would have remained liable to the Sheriff. That was one of the risques of the undertaking of the bail; but, it was a contingent, and, if the Sheriff did his duty even to himself, an improbable hazard. The Sheriff, by failing to make a proper return, has made this contingent hazard a certainty.

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The judgment over-ruling the demurrer to the replication to the second plea is, therefore, erroneous, and to be reversed, and judgment, thereupon entered for the defendant.

BANK OF MARIETTA v. PINDALL.

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v. WILSON.

A corporation of another State may maintain an action against its debtor in the Courts of Virginia.

But a Bank of another State cannot enforce a *primary* contract made in Virginia, as by discounting notes or otherwise.

Assignment, as to bonds or notes, implies more than *endorsement*. It means endorsement by one party, with intent to assign, and an *acceptance* of that assignment, by the other party.

These were appeals from the Superior Court of Law for the county of Harrison.

The Bank of Marietta, in the State of Ohio, brought three actions of debt against the three defendants mention-

1824. ed above, on promissory notes, executed to third persons,
May. made payable at the Bank of Marietta. The declarations
 Bank of state, that the Bank aforesaid was incorporated by the Le-
 Marietta gislature of the State of Ohio; that afterwards, the respec-
v. tive defendants, by their promissory notes in writing, sign-
 Pindall, &c. ed with their hands, and dated, &c., and now produced in
 Court, at Marietta, to wit: at Harrison county aforesaid,
 promised to pay the respective sums mentioned in the
 notes, to their respective payees, and the notes were by
 the said payees, assigned to the said Bank.

The defendants demurred generally to the declarations, and the plaintiff joined in demurrer. They also filed special pleas, stating that the promissory notes in the declaration mentioned, were made and subscribed by the defendants, and *endorsed* by the payees respectively, within the Commonwealth of Virginia, to wit: at the county of Harrison, and not elsewhere; and that the Bank of Marietta is not, and at the time of making, subscribing and endorsing the said promissory note, was not, and never hitherto has been, incorporated or made a body politic or corporate, by any Legislative act of this Commonwealth. To these pleas the plaintiff demurred generally, and the defendants joined in demurrer.

The Court sustained the demurrer of the defendants to the declarations, and over-ruled the demurrers of the plaintiff to the pleas. Judgment was accordingly rendered for the defendants, in all the cases.

The plaintiff appealed.

Stanard, for the appellant.

The only question is, whether a *foreign* corporation can maintain an action in Virginia, in its *corporate* name. There is no case in Virginia on this subject, and but one in the English books. That case is *Henriquez v. The Dutch East India Company*, 2 Lord Raymond, 1532. A part of the same case was decided in 1 *Strange*, 612.

This is an express authority in favor of the right of the foreign corporation to sue. The same principle is affirmed in the case of the *Portsmouth Livery Company v. Weston et al.*, 10 Mass. Rep. 91.

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The truth is, that foreign corporations have as much right to sue, as *foreign persons*. The right of the latter is unquestioned; but both stand on the same ground, as neither are subject to our laws. Even *foreign Sovereigns* may sue in the English Courts. *Nabob of Arcot v. East India Company*, 4 Bro. Ch. Rep. 187, (note.)

But, even if the general question were against me, I contend that Banking corporations are an exception. They are protected by our laws, which punish forgeries of Bank notes of other States. 1 *Rev. Code*, 578. The consequences of the opposite doctrine would be mischievous in the extreme. All the commerce of the country is connected with Banks. They cannot sue in the Federal Courts; because, it has been decided, that a corporation has no *locality*.

It may be asked, whether a contract with a foreign corporation, *made within the limits of Virginia*, can be enforced in Virginia? In answer to this, it may be observed, that this contract does not depend upon the laws of Virginia, but upon those of Ohio. As a general rule, the *lex loci contractus* is to govern. But, there are two exceptions: 1. Where the subject of the contract is fixed in another State; and, 2. Where the contract is to be *performed* in another country.

Here the debts were to be paid at Marietta, and the *default* took place there. The *default*, and not the *contract*, is the *substratum* of the action. This point was decided in the case of *Robinson v. Bland*, 2 Burr. 1077.

In two of the cases, there is no *venue* laid of the assignment, and, therefore, as to them, *non constat*, but that they were made in the State of *Ohio*.

The pleas merely state, that the *factum* of the *endorsement* was done in the county of Harrison; but, they do

1824. not state that the notes were *transferred* at that time and
May, place to the Bank of Marietta. But, even if it were oth-
Bank of erwise, many cases may be supposed, in which a transfer
Marietta might be lawfully made to the Bank, even in Virgi-
v. nia. Suppose the notes were assigned by debtors of the
Pindall, & Co. Bank to relieve themselves from judgments in Virginia.
 Or, a bail-bond might have been given, and the Sheriff as-
 signed it to the Bank. Surely the debtor, in such cases,
 might make a compromise with his creditor. Banks usu-
 ally deal in bills of Exchange. If they cannot sue in
 other States, they would be without remedy in such cases.

These notes can only be considered in one of two lights.
 They were either made for negotiation at the Bank of Ma-
 rietta, or they were subsisting notes, and transferred to the
 Bank in payment of a debt. In the first case, the trans-
 action must have originated in Ohio; in the second, it was
 of no importance where they were made. The debtor
 must surely have the power of availing himself of the
 means of paying his debts.

The case of the unchartered Banks in this Court, 1
Rand. 76, has no influence on this question. That decision
 depended on the law of 1805, and relates only to *unincorpo-*
rated Banks. It was not like the law of New York,
 which forbids all companies not having a charter from the
State, from carrying on Banking operations.

The only remaining question is, whether the statement
 in one of the declarations, that the charter was to continue
 until 1818, does not destroy the right to sue. This ques-
 tion is answered, by saying, that it must be presumed that
 the plaintiffs proved they were a corporation, or they could
 not have maintained their action. The question of *corpo-*
ration or not, is for the jury to decide, and not the Court.
Jackson v. Plumb, 8 Johns. 377.

Wickham, for the appellees.

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It may be laid down as a general proposition, that a *foreign* corporation cannot sue in a Virginia Court. If this proposition be true, it is incumbent on Mr. *Stanard* to shew that a Bank in Ohio is not a *foreign* corporation. A corporation is an artificial being, created by the common law. They are not necessary attributes of government. There may be corporations in some countries, without the right to sue by their *corporate* name. If the law of Virginia did not authorise the creation of corporations, could the Bank of Ohio maintain an action in Virginia?

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Viner, in his 6th volume, p. 265, supports the position, that a *foreign* corporation cannot sue in the English Courts. As to the case of *Henriquez v. The Dutch East India Company*, reported both by Lord *Raymond* and *Strange*, it does not decide this point. There is nothing said in that case, of the corporation being a *foreign* corporation. It is, at most, only a decision of the Court of Common Pleas. Lord *Raymond* gives a more accurate report of the case. According to him, the case related to the liability of bail; but the question at bar was not touched. The case merely decides that the bail was *estopped*, from averring that there was no such corporation.

The first case which relates to the subject, is that from *Massachusetts*. It is to be remarked, that *Massachusetts* has no Court of Chancery; but, their Courts decide Chancery causes under the forms of Common Law. This decision was made by virtue of their Chancery jurisdiction, and cannot be a precedent for a purely Common Law Court. It is not necessary for me to contend that a Court of Chancery would not have jurisdiction of such a case as the present.

The case of the *Silver Lake Bank v. ———*, 4 Johns. 370, is founded on that of *Henriquez v. The Dutch East India Company*, and evidently mistakes the point decided in that case.

1824. English assignees of a bankrupt cannot sue in this country, at least at Common Law. *Harrison v. Terry*, 5 Cranch, 289; 4 *Wheat.* 209; *Dixon v. Ramsay*, 3 Cranch, 324. All arguments from inconvenience, must be addressed to the Legislature. How far a Court of Equity can give relief, it is not material to enquire. It is sufficient for my purpose, to shew that a Court of Common Law cannot afford any.

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It is said that the plea of *default* will give the law. But, the pleadings do not disclose that Marietta in Ohio is that place. The declaration does not state where the Bank of Marietta does business. The name does not shew where this Bank was placed. There may be many places of the same name in the United States.

It was necessary to state in the declaration, that this corporation had a right to sue. It would be otherwise in the case of a Virginia corporation, because their right to sue would result from their being a corporation.

The case of the *Nabob of Arcot* was in the Court of Chancery.

Stamard, in reply.

As to the objection, that it does not appear that this corporation had a right to sue, this right is implied in the term *corporation*. It is not remarkable that there is but one case in the English books, on this subject; as there is but one where the Bank of England was plaintiff.

The distinction between common law and equity, cannot be sustained. If the plaintiff was a *non-entity*, he could not sue in either Court.

The case in *Raymond* at least decides, that the *Dutch East India Company* was a good name to sue by.

The case of the assignees of a bankrupt is unlike the present. That is a case which is governed by the law of the *forum*; this is governed by the *lex loci*. 3 *Dallas*, 370.

As to the term of the charter having expired, I answer: 1824.

1. That it was of no importance to state the term of the charter.
2. That the charter may have been extended.
3. That it is confessed by the record, that it was in existence, by taking judgment against the Bank.

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May 31. Judge CABELL, delivered the opinion of the Court.

The President, Directors and Company of the Bank of Marietta, incorporated by a law of the State of Ohio, brought actions of debt, in the Superior Court of Law for the county of Harrison, against *M'Cally*, against *Pindall*, and against *Wilson*, severally, on promissory notes executed to third persons, made payable at the Bank of Marietta, and assigned to the plaintiffs. The defendants demurred, generally, to the declarations, and the plaintiffs joined in the demurrers. The defendants, also, put in special pleas, stating, in substance, that the notes were made and signed by them, and endorsed by the payees, within this Commonwealth, viz: at the county of Harrison, and not elsewhere; and that the plaintiffs were not a corporate body by any law of this State. To these pleas, the plaintiffs demurred generally, and the defendants joined in the demurrers.

On these pleadings, two questions have been made:

1. Whether a Banking Company, not incorporated as such by any law of Virginia, but by a law of one of our sister States, can prosecute an action in Virginia, in its corporate name and character, on any contract whatever?
2. Whether they can prosecute an action in our Courts on a contract made in Virginia?

1. As to the first question:

It is a principle of universal justice, that the rights and obligations of contracts, valid at the place and time of their inception, do not depend on the residence of the contracting parties. They follow and attend the parties

1824. wherever they may be, or wherever they may go. This
May. is a principle of universal convenience, as well as of justice; and it is recognized as such by all civilized nations. Hence it is, that they lend the aid of their civil tribunals to enforce contracts made in foreign countries, even where the contracts were intended to have been executed in the country where made, and although one or both of the contracting parties may owe no allegiance to the country where the suit may be brought. In exercising this power, the contracts are expounded according to the laws of the place where made: and thus it is, that the Courts of one country take cognizance of, and execute the laws of another country. The only limitation to this comity of nations is, that each will refuse to execute contracts which are contrary to the policy of their own laws.

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These principles, (believed to be incontrovertible,) applied to the cases now before us, must be decisive of the first question.

The appellees, themselves, would not deny the right of the appellants to enforce these very contracts, if they were *natural* and not *artificial* persons, of the State of Ohio. But, the appellants, as artificial persons in Ohio, had, according to the laws of that State, the same capacity to contract and acquire rights, in their corporate name and character; as if they had been natural persons. Rights acquired, in that name and character, are not less protected by the laws of Ohio, nor less sanctioned by eternal justice, than rights acquired by natural persons. In executing contracts made abroad, our Courts are, in many instances, required by justice, and allowed by the comity of nations, to look beyond our own laws, and to regulate their decisions, as to the obligation of contracts in relation to their subject matter, by the laws of other countries. Thus, although, according to our own laws, a man is not allowed to reserve on a contract for the loan or forbearance of money, a greater rate of interest than six *per centum per annum*, yet, if a contract, reserving a greater rate of inte-

not than 6 *per cent.*, be made in a country whose laws authorise such greater rate, our Courts would not hesitate to enforce its strict execution. If the obligation of contracts, as to their subject matter, is thus to be decided and enforced in our Courts, by reference to the laws of the country where made, justice, and the comity of nations, equally require that their obligation, in relation to the contracting parties, should depend on the same laws, and be enforced by our Courts accordingly. It is impossible to imagine a difference between the two cases.

On principle, therefore, there seems to be nothing in the objection, that the appellants, suing as a corporate body, do not owe their existence, as such, to the laws of this Commonwealth. Nor is it supported by any authority, in England, or in this country. It is, indeed, remarkable that but one case has been found of a suit, in the English Courts, by a foreign corporation. *The Dutch East India Company v. Van Moses*, 1 Str. 612; and a branch of the same case, *Henriquez v. The Dutch East India Company*, reported in 2 Str. 807, and in 2 Ld. Raym. 1532. It seems to be somewhat a matter of contest between the counsel, in the cases before us, whether the objection now under consideration was actually made and decided in the English case above referred to. As the point seems to us so clear, on principle, as not to need the support of authority, we do not deem it necessary to determine, with precision, how far it was actually made and decided in that case. The action of the plaintiffs, in that case, was certainly liable to the objection; and whether it was actually made, or not, the action prevailed. The objection has been raised in the Courts of New York, and of Massachusetts, and has been disregarded.

Every argument in favor of entertaining, in our Courts, suits by corporations created by the laws of a country not forming part of the American confederacy, applies with double force to corporations of our sister States. It is rendered doubly necessary by the intimacy of our political

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1824. union, and by the freedom and frequency of our commercial intercourse.
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Nor is there any thing in the nature of this corporation, or of the contract on which they sue, contrary to the policy of our laws. We claim no right to interfere in the municipal regulations of foreign nations, or of our sister States. We claim no power to create corporations for carrying on Banking operations beyond our own limits. But, it is our policy to prevent other nations and States, and the corporations of other nations and States, from doing that towards us, which we forbear to do towards them. It is our policy to restrain all Banking operations by corporations not established by our own laws. It would not, therefore, be permitted to a Bank in Ohio, to establish an agency in this State, for discounting notes, or for carrying on any other Banking operations; nor could they sustain an action on any note thus acquired by them. But, there is nothing in the policy of our laws, which restrains our citizens from promoting their accommodation and interest by borrowing money from a Bank in Ohio. It is not the policy of our laws to restrain one citizen of Virginia from executing to another citizen, or to a foreigner, a note payable at the Banking-house of a Bank legally constituted in Ohio; nor to prevent such Bank from taking an assignment of such note by discounting it in Ohio. We can have no doubt, but that the Bank may recover by suit in Virginia, a debt thus contracted.

It was earnestly, and with great appearance of reason, contended by the counsel for the appellants, that, as incidental to the right of recovering, in Virginia, a debt acquired by an original and legal contract in Ohio, they might legally make, in Virginia, a secondary contract for carrying into effect a contract originally and legally made in Ohio; as, for instance, that they might take from a debtor, in Virginia, the assignment of a note or other chose in action, in payment of a debt originally and legally contracted in Ohio. But, as this point does not necessarily

present itself in these cases, we forbear to express any opinion upon it. 1824.

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So far, then, as relates to the first and general question, viz: the right of the appellants to sue as a corporation, we think the demurrers to the declarations should have been over-ruled, and the demurrers to the pleas should have been sustained.

2d. As to the second question: have the appellants a right to prosecute actions in our Courts, on contracts made in Virginia?

We have already stated, that no foreign Bank could make a primary contract in Virginia, by discounting notes, or otherwise. No right of action, therefore, could arise from the exercise of such a power.

But, do the pleadings in these cases shew that the contracts of assignment, by which the appellants claim, were made in Virginia?

Let us first examine the special pleas of the defendants. We do not think that they alledge, or intended to alledge, that the *assignment* was made in Virginia. The declaration in the case against *M'Cally* avers, that the payee of the note "endorsed and assigned the same by his writing on the back thereof, to the plaintiffs;" and the declarations in each of the other two cases, aver, that the payee, by his endorsement on the said note, assigned it to the plaintiffs, but all the declarations are silent as to the place where the assignment was made. How are these averments in the declarations met by the pleas? Not by the allegation that the notes were *assigned to the plaintiffs in Virginia*; nor even by the allegation that they were *endorsed to the plaintiffs in Virginia*; but simply, that they were *endorsed in Virginia*. The term *endorse*, when applied to bills of exchange, negotiable by the custom of merchants, or to papers made negotiable by our statutes, may, *ex vi termini*, import a legal transfer of the title. But, as to bonds and notes, not negotiable, the legal title to them passes by assignment only; and as to them, endorsement is

1824. not equivalent to assignment. As to them, assignment
May. means more than endorsement; it means endorsement by
 Bank of one party, with intent to assign, and an acceptance of that
 Marietta assignment, by the other party. The notes in question
v. are not negotiable, according to our laws, but assignable
 Piddall, &c. only. The pleas, therefore, that they were *endorsed* in
 Virginia, tendered immaterial issues, and were properly
 demurred to. It may have been the intention of the plea-
 der to entrap the plaintiffs, if they took issue, by confin-
 ing the proof to the mere fact of the payees writing their
 names on the backs of the notes; and this is rendered prob-
 able, by the circumstance that the notes are not alleged
 by the pleas to have been endorsed *to the plaintiffs*.
 They might well be *endorsed* in Virginia, and *assigned*
 in Ohio. The question, therefore, whether the appellants
 could sue, in our Courts, on a contract made in Virginia,
 is not presented by the pleas.

Let us next examine the declarations and the general
 demurrers thereto. The declarations, in all the cases, al-
 ledge that the notes were assigned by the payees to the
 plaintiffs; but do not state *where* the assignments were
 made. The effect of the demurrers is to admit the assign-
 ments, as laid in the declaration. If these assignments
 were made in Ohio, they were lawful, and will serve as
 the foundation for suits in our Courts; if they were made
 in Virginia, as original contracts, they were null and void,
 and can give no right of action. In the total absence of
 all allegations by either plaintiffs or defendants, as to the
 place where the assignments were made, we do not feel
 ourselves constrained to intend that they were made at a
 place where the parties had no right to make them, and
 where the attempt to make them would be vain and nuga-
 tory. On the contrary, we think, that on these pleadings,
 the assignments must be taken to have been made at the
 Bank of Marietta, where the notes were originally made
 payable, and where the appellants had a right to dis-
 count them. If the assignments had been actually made

in Virginia, and the defendants had wished to avail themselves of that fact as a defence, there were two courses by which they might have accomplished that object. They might have pleaded the fact specially, in which case the plaintiffs would have been bound to take issue, or to demur; or they might have demurred specially to the declaration, assigning for cause, that the plaintiffs had not laid the assignments at a place where they could lawfully receive them. This objection, as to matter of form, might have been fatal on a special demurrer. But, we think it is too late to take advantage of it, after a general demurrer. It is certain, that the defendants could not avail themselves of it, for reversing the judgment, after verdict; and for this, we refer to the case of *Buster v. Ruffner*, 5 Munf. 27, in which the venue was laid in a county different from that in which the suit was brought.

The judgments must be reversed; the demurrer to the declarations over-ruled; the demurrers to the pleas sustained; and judgments entered for the plaintiffs for principal and interest, according to the notes, and for the costs, &c.

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May.

WAMSLEY v. LINDENBERGER & Co.

A promissory note is executed by one of two partners, in the name of the firm. One of the partners was an infant at the time of the execution of the note. An action is brought against the adult partner only. The action is badly brought; the act of the infant being *voidable* only, and not *void*.

Lindenberg and *Hebb*, partners, brought an action of debt, in the Superior Court of Law for Lewis County, on a promissory note, against *Wamsley*. The declaration describes the note as being in the proper hand-writing of *Pennell*, in the co-partnership name, style and firm, of *F. A. Pennell & Co.*: that the said firm consisted of the said *Pennell* and *Wamsley*: that the said *Pennell* was, at the day of executing the said note, an infant under the age of twenty-one years, and on that account, *not liable, or obliged in law, to the payment of the said note*; by reason of which, the said *Wamsley* became liable to pay the same.

The defendant demurred generally, and filed two pleas, viz: 1. A plea of *nil debet*; 2. That at the time of making the said supposed promissory note, the defendant *Wamsley* was not a partner in trade of the said *F. A. Pennell*, as alledged in the declaration. The plaintiffs joined in demurrer, and replied generally to the pleas.

The Court over-ruled the demurrer; and a jury being sworn, they found for the plaintiffs, subject to a demurrer to evidence; which is not material to the decision in this case. The Court gave judgment for the plaintiffs, that the demurrer to evidence should be over-ruled. From which judgment, the defendant appealed.

Leigh, for the appellant.

Nicholas, for the appellees.

May 17. Judge GREEN, delivered the opinion of the Court.* 1824.
May.

Wamsley
v.
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The appellant and *Pennell*, an infant, were partners in trade under the firm of *F. A. Pennell & Co.* *Pennell* executed a promissory note in the name of the firm to the appellees, for valuable consideration. The appellees brought an action on this note, against *Wamsley* only; and in declaring, alledged that *Pennell* was an infant when he executed the note, and, therefore, was not bound by the contract; and that the appellant was solely bound. The appellant demurred and pleaded to the declaration, and judgment was given for the plaintiffs.

The only question is; whether this action can be sustained on this declaration; and this depends on the enquiries, whether the contract declared upon was, as to the infant, absolutely void, or only voidable, at his election; and whether the plaintiffs could alledge the infancy of *Pennell*, for the purpose of shewing that it was either void or voidable.

There is considerable difficulty in ascertaining, from the English authorities, what contracts of an infant are void *per se*, and what are voidable only, at the election of the infant. The case of *Thompson v. Leitch*, reported in *Carthew, Modern Reports, Salkeld*, and many other books, contains many *dicta* upon these points. That was the case of a surrender by an idiot, to the prejudice of a remainder-man, claiming *per formam doni*, and who was allowed to alledge the insanity of the surrenderor, for the purpose of avoiding the surrender. This case is examined and commented on by the Court of King's Bench, in the case of *Zouch v. Parsons*, 3 Burr. 1794, where it is shewn, that the doctrines laid down in *Thompson v. Leitch*, are not applicable throughout to the case of contracts made by infants. In the case of *Zouch v. Parsons*, it is laid down

* Judge COALTER, absent.

1824. in general, that the contracts of infants may be ratified or
 May. avoided, at the pleasure of the infant, when he attained his
 Wamsley age: that this is a privilege personal to the infant; and that
 v. neither the other contracting party, nor a stranger, could
 Lindenberger & Co. alledge the infancy, to avoid the contract: that it followed,
 from the power of the infant to confirm his contract after
 he came of age, that it was not void *ipso facto*, (for if it
 was, it could not be confirmed,) but only *voidable* at the
 infant's pleasure; in short, that this privilege existed only
 for the benefit of the infant, if he chose to avail himself of
 it, but to no other purpose: that these general rules were
 liable to some exceptions, as where the existence of the
 contract for a moment would prejudice the infant, by sub-
 jecting him to a penalty, forfeiture, or breach of trust; in
 which cases the contract is void *ab initio*. Other cases
 fortify those general principles, as applicable to the case at
 bar. That a contract, such as this, may be confirmed by
 the infant, after he comes of age, appears by the cases of
Cole v. Saxby, 3 Esp. N. P. Cas. 159, and *Haner v.*
Killing, 6 Esp. N. P. Cas. 102; in the first of which,
 the plaintiff and defendant, then an infant, had joined in a
bond for securing an annuity to another. The plaintiff had
 paid all, and sued the defendant for a moiety, who pleaded
 his infancy; to which the plaintiff replied, that he had as-
 sumed after he came of age; and *per* Lord KENYON the
 defendant was bound by this *assumpsit*: And in the latter
 case, Lord ALVANLEY said, that an infant was discharged
 by his *non-age*, for goods, not necessities, furnished to
 him before his full age; but that he might bind himself by
 a new promise after he attained his full age.

If these contracts were void *ipso facto*, they could not
 be a consideration for supporting a new promise, after the
 infant attained his age. Such new promise would be a
nude pact. Nor can the other party to the contract, al-
 ledge the infancy to avoid the contract. Thus in *Forester's*
Case, cited in *Vin. Abr. Enfant*, H. 4, pl. 3, an in-
 fant, by his guardian, brought *assumpsit* on a promise by

the defendant to make an assurance to the infant, on consideration that the infant would pay so much money. It was alledged in the defence, that the infant's promise being void, there was no consideration for the defendant's promise. But, the Court held that the action will lay, "for it is only in the election of the infant to make his promise void, and not of the other party." And so in many other cases cited in *Bacon's Abridgment* and *Viner*. In *Van Bramer v. Cooper*, 2 Johns. Rep. 279, the adult defendant sued with an infant, was not permitted to avail himself of the infancy of his co-defendant, which he might have done, if the contract was void *ab initio* as to the infant.

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The plaintiffs, therefore, in this case, could not alledge the infancy of *Pennell*, to avoid the contract as to *Pennell*. If they had sued *Pennell* and *Wamsley* jointly, and *Pennell* had insisted on his infancy, to avoid the contract as to him, it might be doubted whether they could, in that action, have judgment against *Wamsley*. This doubt arises from two *Nisi Prius* decisions; the one by Lord KENYON, in *Chandler v. Parks, &c.*, 3 Esp. N. P. Cas. 76; the other by Lord ELLENBOROUGH, in *Jeffry v. Frebaine*, 5 Esp. N. P. Cas. 47, in which it was decided, that in such case, judgment could not be given against the adult defendant, but the plaintiff should discontinue and bring a new suit against the adult; and, if he pleaded in abatement that another was joined in the contract, a replication that such other was an infant, would be a good answer to the plea. If this be law, it does not seem to follow, that the plaintiff can, in the first instance, and before the infant has elected to avoid the contract, alledge that the contract was void as to the infant. After the infant has in fact availed himself of his privilege, the plaintiff, alledging that fact, might maintain his action against the adult, in a new suit, if he were not already before the Court. But, if he were already a party to the suit in which the infant pleaded infancy, we see no reason why the plaintiff should be turned round to a new suit; since all the facts necessary to enable

1824. him to maintain a new suit, would already appear truly
May. stated on the record. For, the contract, although avoided
Wamsley by the plea of infancy by relation, *ab initio*, was yet truly
v. a subsisting contract when the declaration was filed, and
Lindenberger & Co. capable of being confirmed by the infant, when of age.
 Those *Nisi Prius* cases have been reviewed in the Supreme Court of New-York, and over-ruled. *Hartrup v. Thompson*, 5 Johns. 160; in conformity to which, the case of *Cole v. Pennell*, (ante,) 174, was lately decided in this Court. In England, a note of hand given by an infant, even for necessities, is perhaps void, because, having the effect of a Bill of Exchange by statute, he might be precluded from contesting the consideration against a third person. But no such objection exists, as to the note of hand given in this case.

Upon the whole, we think that the contract in question, was not, as to the infant, absolutely void, but only voidable at his election; that it was a subsisting contract when the suit was instituted; that it was not competent to the plaintiff to treat it as void, until the infant had elected to make it void; and the action should have been brought jointly against *Pennell* and *Wamsley*; that, therefore, the demurrer to the declaration must be sustained, the judgment reversed, and final judgment entered for the defendant.

JONES v. HOBSON.

1824.
June.

Where a suit is brought against an executor and his sureties, and the executor confesses assets, it is competent for a Court of Equity to decree immediately against the executor; and that liberty should be reserved to the creditor to proceed against the sureties *by motion*, if it should become necessary.

The sureties of an executor are not responsible for the proceeds of land sold by him, under the will.

The sureties of an executor are not responsible for the acts of his executor, in the administration of the estate of the first testator.

This was an appeal from the Richmond Chancery Court. The case was elaborately argued in this Court, by *Call* and *Leigh*, for the appellant, and by *S. Taylor* and *Stanard*, for the appellee. The following opinion presents a full view of the facts of the case, and of the arguments on both sides.

June 11. Judge GREEN, delivered the following opinion, in which the other Judges concurred.*

John McRae, sen. made his will in February, 1804, and died in the same month. By this will, after directing, "In the first place, I devise all my just debts to be paid, as soon as it can be conveniently done by my executors," (and making sundry specific devises and bequests of real and personal property, and sundry pecuniary legacies to a large amount, and, amongst the rest, an annuity of £ 50 *per annum*, to Mrs. *V. Claiborne* during her life,) he gave as follows: "In the sixth place, I give all the rest and residue of my estate to my brothers and sisters residing in the Kingdom of Great Britain, and my sister residing in Virginia, equally to be divided amongst them, share and share alike, to hold to them and their lawful representatives, respectively, forever; and, in order to ef-

* Judge CARR, did not sit in this case, it having been argued before his appointment.

1824.

June.

Jones
v.
Hobson.

fectuate my intentions, and to secure the payment of the foregoing legacies, I will and require, that all the rest of my lands and slaves, not herein-before mentioned, shall be sold by my executors herein-after mentioned, or such of them as may undertake the execution of this my will, on twelve months credit, at public sale, and the purchasers to give bond and security satisfactory to my executors, whom I do, in like manner, desire to sell all the rest and residue of my personal estate, on the same credit and terms, and whom I desire to collect the debts due to me as speedily as they can;" and he appointed *John McRae, jr.* and *Joseph Harding*, executors thereof. *Harding* refused in Court to undertake the execution of the will; and on the 20th of February, 1804, *John McRae, jr.* qualified, and executed the usual bond, with *Hector McNeale*, *John Wilder*, *Joseph Jones*, and *James Durell*, as his sureties.

In April, 1805, *John McRae, jr.*, the executor, purchased from the residuary legatees of *John McRae*, the elder, their interests in the estate, and gave bonds for the purchase money, with *Joseph Jones*, *Robert Birchett*, *George Pegram*, *Paul Nash*, and *David Robertson*, his sureties; and, to indemnify them, executed a deed of trust, which was duly recorded, dated on the 27th of April, 1805, to *Thomas B. Robertson* and *B. W. Leigh*, by which he conveyed to those trustees a tract of land called the *Globe Tavern*; 200 acres, a part of *Archer's Hill* tract, being the same conveyed by *Watkins* to *John McRae, sen.*; also two lots on the upper end of High street, purchased by *John McRae, sen.* of *Pride*; 30 shares in the *Manchester Turnpike Company*; and 66 shares of *Virginia Bank* stock; to all of which, he states in the deed, he had a legal right, title, and claim. *John McRae, jr.*, afterwards sold the *Bank* stock, and paid the larger part of the debt.

On the 16th of September, 1807, *John McRae, jr.* conveyed in trust to *B. W. Leigh*, *J. G. Wilder*, *Daniel Eppes*, and *Thomas Jones*, the property embraced in the

deed of the 27th of April, 1805, except the Bank stock, and also the following property: two additional shares in the Manchester Turnpike Company; an estate called *New Market*, as described in a bond from *Bate* to *John McRae, jr.*; a lot on High street, on which a tobacco ware-house was to be built, and 27 slaves; in all of which, the deed states, he had a legal and equitable estate. This conveyance was for the indemnity of the sureties in his executor's bond. In May, 1809, *John McRae, jr.* made his will, which was proved on the 3d of July, 1809. The will appointed *Richard McRae* and *Daniel Eppes* his executors, and directed that they should qualify without giving security; which they did. But, on the same day, they executed a deed of trust for the further indemnity of the sureties of *John McRae, jr.*, for his administration of the estate of *John McRae, sen.*; especially as to the two largest legacies of \$20,000 each, given by the will of *John McRae, sen.* to two infants, payable when they should attain their respective ages of 21 years, and which were not then due. This deed was made in trust to *B. W. Leigh, J. G. Wilder, Joel Hammon, and Thomas Jones*; and conveyed the property contained in the deed of September, 1807, and also the following: 15,593 acres of Kentucky land, conveyed by *Greenhow* to *J. McRae, jr.*; a moiety of a lot in Petersburg, on which the Bank was built, purchased by *J. McRae, jr.*; and a lot on High street, belonging to *J. McRae, jr.*

Various suits were prosecuted mutually by the parties, whose interests were affected by, or arose out of, the facts above stated; in all of which, the sureties for the administration of the estate of *John McRae, sen.* by *John McRae, jr.* were parties; in the course of which, the greater part of the trust fund, embraced in the last deed of trust, being disposed of, such as had been sold was ascertained to amount to \$49,554 09½, of principal, besides interest to a large amount. No part of the trust fund was sold in the life-time of *John McRae, the younger.*

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From the proceedings in these causes, it appears, that out of the trust fund, payments had been made by the order of the Court, for the support of the two infant legatees, who were entitled under the will to such support, until they attained the age of 21; and, in full payment of one of the legacies of \$20,000; and, for the charges arising out of the execution of the trust, to the amount of \$24,227 17; leaving a balance of 31,429*l.* 0*s.* 7*d.*, besides interest to the amount of \$5,503 22, up to January 4th, 1819, belonging to the trust fund; out of which, was paid by the decree of the Court of the 21st of January, 1819, (in satisfaction of the balance due from *John McRae, jr.* to the residuary legatees, for his purchase from them,) \$8,554 33; leaving a balance of the trust fund (besides the property unsold to a considerable amount, probably upwards of \$5,000,) of \$28,377 96.

Hobson and wife, and *Brooks* and wife, (the females being two of the legatees of *John McRae, sen.*, entitled to 1,000*l.* each, on account of which, some payments had been made,) severally prosecuted their suits against the executors of *John McRae, jr.*, the sureties for the administration of *John McRae, jr.* and the trustees; and, upon the confession in Court, of the executors, that *John McRae, jr.*, had received assets of the estate of *John McRae, sen.*, which had afterwards come to their hands more than sufficient to pay the debts and legacies, a decree was pronounced in both causes, which came on to be heard together, against the executors of *John McRae, jr.*, for the balance due upon the legacies; and, liberty was reserved to the plaintiffs, to apply to the Court for further relief against the other defendants, if it should become necessary.

Upon appeal, this decree was reversed, because it did not require bond and security from the plaintiffs to refund, if necessary, for the payment of debts. The decree was thereupon corrected in this particular; and, the bonds being given, execution issued against the executors, which

was returned *nulla bona*. Thereupon, the plaintiffs gave notice to the sureties, that they would, under the reservation in the decree, apply to the Court to decree the legacies against them. This application was resisted by the sureties on various grounds. They filed a joint affidavit, stating, that they verily believed that the personal estate of *John McRae, sen.*, which came to the hands of *John McRae, jr.* to be administered, did not exceed \$82,800 89; and, that the real estate sold by him, amounted only to \$12,000 36; and, that he paid debts and legacies to the amount of \$68,826 02, and left estate of *John McRae, sen.* to the amount of \$101,989 65, including the trust fund, (which had not been sold,) and exclusive of real estate unsold, and uncollected debts; as appeared by the statement annexed to the affidavit; and, they insisted, 1. That they were not responsible for the proceeds of the real estate; 2. That *John McRae, jr.* left assets of his testator, which came to the hands of his executors, sufficient to pay the debts and legacies of *John McRae, sen.*, they were thereby absolved from responsibility; 3. That they were not liable for the acts of the executors of *John McRae, jr.*; 4. That they could not be liable upon motion, but only by bill; 5. That the commissioner's reports in the other causes, were not evidence against them; and, if they were, that they were too imperfect to justify a decree against them. And, it is here objected also, that the balances due upon the legacies claimed by these plaintiffs, are not sufficiently ascertained as to the sureties.

The 4th objection above-stated, would, if well founded, put an end to this cause, and make any enquiry upon the other points at present, unnecessary. This question seems to have been settled in the case of *Sheppard's executor v. Starke and wife*, 3 *Munf.* 29, in which it was said by the Court, that under such a reservation in a decree, a party may resort to the Court for its further interposition, either in a summary way or by bill. It was not necessary, in this case, to put any new fact in issue,

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to enable the Court to do complete justice between the parties. Upon the application of the plaintiffs, upon motion, the Court could do that, which they might, and probably would have done, when the decree against the executors was pronounced, but for their confessing assets; that is, to decree against the sureties, if there was already enough in the record to justify a decree; or, if not, to order the necessary accounts, to ascertain the extent of their liability. When the executors confessed assets, it was beneficial to the sureties, that the decree should be immediately pronounced against them, instead of proceeding in the cause, so as to subject the sureties jointly with the executors; since there was a better chance of indemnifying them, by compelling payment from the executors, than if the decree had been delayed. The course taken, was obviously beneficial to the sureties, and they can suffer no possible injury from the subsequent proceeding against them upon motion.

The parties were rightly in Court, and the decree was right or wrong, as it shall appear that there was or was not in the record, sufficient evidence to shew, that the sureties were responsible to an amount sufficient to justify the decree against them. And this depends upon the various questions discussed at the bar, affecting the extent of their liability.

The first of these is, whether the sureties of an executor are responsible for the proceeds of land, devised to be sold by him.

The Ecclesiastical Court in England, to whom the jurisdiction as to the probat of wills and granting administrations, belonged, never had authority to require of an executor, a bond for the due administration of the assets; 4 *Burns' Ecclesiastical Law*, 176; but, had power at the common law, to demand a bond from administrators, as well in the case of administrations with the will annexed, as in cases of pure intestacy. This appears from the case of *Folkes v. Dominique*, 2 Stra. 1137, in which it was ad-

judged, that a bond given by an administrator *durante minoritate*, with the will annexed, with a condition to exhibit an inventory, and to administer duly by paying debts and legacies, though not coming within the statute of the 21st Henry 8th, was good at the common law, as to the payment of legacies; that being a subject of ecclesiastical jurisdiction. The statute of Henry 8th, referred to in this case, provided, that in case of intestacy, or the executor's refusing to prove the testament, the Ordinary should take from him to whom the administration was committed, surety for the true administration of the goods, chattels and debts. 4 Burns' Eccl. Law, 204. This statute did not extend to any administration with the will annexed, except in the case of the executor's refusing to prove the will; and it was determined, that the non-payment of a debt could not be assigned as a breach of the condition of the bond to administer truly. Under this statute, as well as under the statute of 22 and 23 of Car. 2, the expression, "administer truly according to law," meaning only, as it was said, to bring in his account. 1 Salk. 316; Lutw. 882. It is of some importance to the just solution of the question under consideration, to ascertain the precise form and substance of the bond given by an administrator with the will annexed, in England, at and before the time when the Legislature of Virginia directed bonds to be taken from all executors and administrators. The form of this bond is not to be found in any book, to which we have access. Yet, it may be ascertained with a sufficient degree of certainty, from circumstances which are accessible. The duties of an executor, and of an administrator with the will annexed, were identically the same, in respect to rendering an inventory and account to the Ordinary; (See, as to the duty of an executor to account to the Ordinary, Toller's Law of Executors, 490, and stat. 21 Ed. 3, ch. 11,) and as to the payment of debts and legacies. The engagements of the one and the other were probably exactly the same; the executor being bound by

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his oath, and the duty of his office; and the administrator with the will annexed, in addition to these obligations, by his bond. The oath of both was probably the same, and indicated the extent of their obligations. The oath of an executor was: "That he will truly perform the will, by paying, first his testator's debts, and then the legacies therein contained, as far as the goods, chattels, and credits will thereto extend, and the law charge him; and that he will make a true and perfect inventory of all the goods, chattels, and credits, and exhibit the same into the Registry of the Spiritual Court, at the time assigned by the Court, and render a just account thereof, when lawfully required." *Toller's Law of Exec.* 58. As this oath was intended to extend to all the obligations of the executor, as such, it may be confidently supposed, that the bond taken of an administrator with the will annexed, was in the form of this oath; and this is indicated by the case in *Strange*. This oath and bond were intended to insure the performance of those duties which devolved on the executor or administrator with the will annexed, purely in the character of executor or administrator, and which the Ordinary had a right to exact the performance of. The goods, chattels, and credits were the subject to be inventoried and accounted for; and out of which, the debts and legacies were to be paid; and the engagements made by the executor could not be considered as extending to any subject, over which the Ordinary had no sort of jurisdiction. The Ordinary could not lawfully exact an engagement upon a subject, not confided to his jurisdiction; and if he did, a prohibition might be had. Thus, if he attempted to exact a bond (before the statute of 22 and 23 of Charles 2, which authorised such a bond,) from an administrator to distribute the surplus, a prohibition lay; and, if such a bond was taken, it was void. *Lev.* 233. The bonds taken from an administrator, or administrator with the will annexed, were originally considered as a security to the Ordinary alone, for the performance of the duties of

the administrator, and that creditors could not avail themselves of it, although legatees could; because, legatees had a remedy in the Ecclesiastical Court, and no where else; whilst creditors had a remedy only in a Court of Law, and not in the Ecclesiastical Court. It is only in comparatively modern times, and since the statute of *Charles 2*, that creditors have been permitted to avail themselves of the bond. *Archbishop of Canterbury v. House*, Cowp. 140; *Greensides v. Benson*, 3 Atk. 248. The bond being taken originally, for the purpose of enabling the Ordinary to enforce the performance of the duties which he had a jurisdiction to enforce, could not extend to subjects as to which he had no jurisdiction. It was taken, because the Ecclesiastical Courts could only enforce their decrees by ecclesiastical censures, which might sometimes be inefficient, and the bond, in that case, was necessary to give a more effectual remedy. It might be taken from administrators, because they claimed under the Ordinary, and not as a matter of right; whilst it could not be taken of executors, because they claimed under the testator, and as a matter of legal right. 11 *Vin.* 359, *pl.* 12. The Ordinary had jurisdiction of matters testamentary only. But the proceeds of land, given by the testator for the payment of debts and legacies, were not testamentary, and the executor was not bound to put such proceeds into the inventory. 14 *Vin.* 468, *pl.* 14. The Ordinary had, originally, the exclusive jurisdiction of enforcing the payment of legacies, payable out of personal assets, until the time of Lord *Nottingham*, when the Chancery, for the first time, assumed a jurisdiction over that subject, upon the grounds that the executor was a trustee, and that the remedy in the Ecclesiastical Courts was defective. *Toller's Law of Exec.* 482. But, the Ecclesiastical Courts never had a jurisdiction to enforce the payment of legacies out of the proceeds of land devised to be sold, that not being a testamentary subject. *Dyer* 151; *Palm.* 120; 2 *Show.* 50, *pl.* 36; *Hob.* 265. It was a mere trust, which, at all times, could

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only be enforced in a Court of Equity. The words, therefore, in the oath of an executor, and in the bond of an administrator with the will annexed, "and the law shall charge him," related to the goods, chattels and credits, of which they were bound to return an inventory and account; and not to subjects, of which they were neither bound to render an inventory or account to the Ordinary, and as to which, the Ordinary had no sort of jurisdiction, and meant "and the law shall charge him," in respect to such goods, chattels and credits. If the Ordinary had been permitted to take a bond in the same terms, from an executor, there would have been no possible means of enforcing, by means of the bond, the payment of legacies, payable out of the proceeds of real estate. If there were an express stipulation in the bond, to pay the legacies directed by the will to be paid out of real estate, it would have been void, as relating to a subject not within the jurisdiction of the Court; as bonds taken of administrators for the distribution of the surplus, before the statute of 22 and 23 *Charles 2*, were void, as not being within the jurisdiction of the Court; *a fortiori*, then, the general terms "as the law shall charge," could not be construed as an engagement to pay legacies out of the proceeds of real estate. The judgment was given in the case cited from *Strange*, because the legacy claimed was payable out of personal assets, and, therefore, within the jurisdiction of the Ecclesiastical Court; and the bond, therefore, good as to the legacy.

Upon the settlement of Virginia, the existing laws of England were our laws. The jurisdictions of the Courts of Common Law and of Equity, and of the Ecclesiastical Courts in England, of necessity devolved upon, and were exercised by, the General Court, consisting of the Governor and Council, the only judicial tribunal in the country. But in the exercise of those jurisdictions, they could not be blended, and could only be properly exercised, according to the existing laws in England, unless modified by statute.

The first statute passed in Virginia, requiring a bond and security from executors, was enacted in 1711, and related to *suspected* executors only. This also prescribed the form of the bond to be given by administrators, and the oaths to be taken by executors and administrators. The oath prescribed for executors and administrators, with the will annexed, as well as the form of the bond to be given by them, was the same, and the oath was the same, as the oath of an executor in England, except that the oath prescribed by our statute, omits the stipulation to render an account; which omission was supplied in after statutes. The bond prescribed, contains all the obligations of the oath, and also a stipulation to render an account of his actings and doings therein; that is, in administering the goods, chattels and credits, which shall come to his hands. The form of the administration bond is the same as that prescribed in England by the statute of 22 and 23 of *Charles 2*. There is the strongest probability that the form of the bond of an executor or administrator with the will annexed, prescribed by our statute, was taken literally from that in use in England, in the case of an administrator with the will annexed. The bond conforms strictly to the form of the oath, as probably did the bond used in England. Our legislation at that time conformed, as to subjects not local, implicitly to English precedents; and, accordingly, this act adopts the form of the administration bond prescribed by the English statute.

The Legislature, in adopting the terms "and as the law shall charge him," (which are the only words in the bond, which can give any color to the claim to subject the sureties to a responsibility for the proceeds of land devised to be sold, and which were so familiar in the English law, and there could not in any possible case, be construed to extend to an accountability for the proceeds of land,) must be presumed to have intended to give them the same effect here, which they had there. But independent of this view of the subject, the fair and literal interpretation of the

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condition of the bond, excludes the proceeds of lands from its operation; they not being goods, chattels or credits, in any case. This condition, after stipulating to return an inventory of the goods, chattels and credits, and to administer the same *according to law*, and to render an account of his actings and doings *therein*, proceeds to stipulate to pay and deliver the legacies contained and specified in the testament, as far as the said goods and chattels and credits will thereunto extend, according to the value thereof, "and the law shall charge him." This expression, "*and the law shall charge him*," does not refer to the administration of the goods, chattels and credits, in the payment of debts; for that was already provided for by the previous stipulation to administer them "according to law," that is, as the law should charge him; and it would have been superfluous to repeat the same stipulation again. It refers only to the delivery and payment of legacies, and has the same meaning as the former expression "according to law," used in relation to the administration of the goods, chattels and credits. If, indeed, that part of the clause in relation to the payment of legacies "as far as the said goods, chattels and credits will extend, according to the value thereof," had been omitted, there would have been some color for the construction contended for by the appellees. Then the obligation would be to pay the legacies, to all intents, as the law shall charge him; and if the Legislature had intended that the bond should cover the proceeds of real estate received by the executors, they might possibly have put the bond into that form. But considering the state of the law upon the subject of lands devised to be sold by executors, at the time this act passed, and that such an expression would have left it doubtful, whether the sureties were bound for any act of the principal, not done in the exercise of his strictly executorial functions; it is probable, that if such had been the intention of the Legislature, they would have expressed it in more explicit terms.

Whatever might have been the proper construction of a bond, leaving out those words relating to the goods, chattels, and credits, they could have been inserted for no purpose but to shew, that they were the sole subject of stipulation. The words "as the law shall charge him," were necessarily added, for the purpose of qualifying the stipulation in relation to them. Thus, if these words had been omitted, the executor paying a pecuniary legatee, by the disposition of a specific legacy, or paying (when there were not goods, chattels, and credits sufficient to pay all the pecuniary legacies,) the whole of the funds to one pecuniary legatee, and none to the others, would not have violated this bond; for, he would have paid the legacies, as far as the goods, chattels, and credits would extend, according to the value thereof, but not as the law charged him. This provision was also necessary, to qualify the preceding stipulation as to goods, chattels, and credits; for, without it, the executor would literally engage to pay the legacies, to the extent of the assets, without regard to the claims of creditors. And, for the same purpose, the words "according to law" were added to the stipulation to administer; for, without them, he might, without violating his bond, have appropriated the assets in the payment of debts, without regard to their dignity. If these consequences are not clear, they are at least such as it is reasonable to presume, the Legislature might wish to provide against. This construction of the bond is fortified by the terms of the oath. In that, the payment of debts and legacies is not provided for in distinct sentences, as in the bond. But, it engages for the payment of debts and legacies, as far as the goods, chattels, and credits will extend, in one sentence, and superadds, "and the law charge you," as applicable to both debts and legacies; which were to be paid as far as the goods, chattels, and credits will extend. When the substance of this oath was put into the form of a bond, the subjects of debts and legacies were separated and provided for in distinct sentences; and the expression which qualified

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the engagement as to both, jointly in the oath, was applied to each separately in the bond; and had the same meaning both in the oath and bond. If the words "and the law shall charge you" in the oath, had not been considered as a qualification of the preceding stipulation, but as an independent stipulation, and binding the executor to the full extent, to which he might be bound, acting under the will in any way, as for the proceeds of land sold by him, then it bound him as to creditors as well as legatees; and no imaginable reason can be suggested, why the same stipulation was not carried into the bond as to debts, so as to bind him to pay the debts, in general terms, as the law should charge him. But, it is not. He only binds himself to administer the goods, chattels, and credits, according to law. If the expression "and the law shall charge him" in the bond, be considered as an independent stipulation, and not as a qualification of the preceding stipulation as to the payment of the legacies, to the extent of the goods and chattels; then the Legislature will have provided a security for legatees, which they have not provided for creditors; contrary to the spirit of our laws, and the terms of the executor's oath, which put them on the same footing. The Legislature have construed the terms in the executor's oath, to pay debts as far as the goods, chattels, and credits will extend, and the law charge him, to mean, to pay debts as far as the goods, chattels, and credits will extend, *according to law*; and so must we construe the same terms in the bond, in relation to the payment of legacies, to mean, that they should be paid as far as the goods, chattels, and credits shall extend, according to law, unless there be some evidence, arising from the *Legislation* on this subject, going to shew that the Legislature intended otherwise; without stopping to enquire, whether such an intent could be enforced, if not fairly to be deduced from the condition of the bond. The laws have been examined to ascertain what they indicate as to this supposed intention of the Legislature. The laws upon this subject have

been repeatedly re-enacted, with some alterations, but the oath and bond have remained in substance the same, with only slight verbal variations, not at all affecting this question.

The act of 1711 provides, that the bond may be put in suit until the will "be fulfilled;" but, adds "as far as lies in the executors to fulfil the same." This expression is dropped in the subsequent laws, and they direct that it may be put in suit by the party injured by the breach thereof. This expression in the act of 1711, is understood to relate to the fulfilment of so much of the will, as it belongs to the executors, in their character of executors merely, to fulfil; and, not to any superadded duty, imposed upon them by the will as trustees or otherwise. If it were not confined to their mere character as executors, but was extended to all the duties which might devolve, by the will, on the same person who was executor; then, if a testator said, "I appoint my executors guardians of my children," or, "my executors shall hold my lands as trustees, for the separate use of my daughter, a married woman, and are to pay the rents and profits to her," the sureties would be liable for the acts of the executors in their characters of guardians and trustees. The consequences to be deduced from the comparison of the oath and bond, have already been noticed. All the acts require the Courts to take bonds, at least to the value of the "estate." They require inventories and appraisements of the "estate" to be returned; and, the context shews, that by "estate" was meant "goods, chattels and credits;" for, of these and these only, the bond stipulates that an inventory should be returned. "Estate" in the act, and "goods, chattels and credits" in the oath and bond, mean the same thing. If the proceeds of land, devised to be sold by the executors, had been intended to be secured by the bond, that also should have been taken into the estimate, in fixing the amount of the bond. Again, these statutes provide, that if the testator directs that his executor shall give no secu-

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rity, and leaves "visible estate sufficient to pay his debts," the Court shall not require security; but, if the executor is suspected of fraud, or the "personal estate" be insufficient for the payment of debts, security shall be required, notwithstanding the direction of the testator to the contrary. The context shews, that "visible estate," meant "personal estate," they being used as synonymous. If the executor was believed to be honest, and the personal estate was sufficient for debts, the Court had no discretion, and could not demand security. What was the meaning of this provision? That the executor being honest, and the estate sufficient, there was no danger of any creditor losing his debt, no matter in what order the debts were paid; but, the most honest executor, if the estate were insufficient for the payment of all the debts, might ignorantly commit a *devastavit*, by paying off debts of inferior dignity, and leaving nothing for the payment of debts of superior dignity; and, if the executor was poor, a creditor who was entitled to be paid out of the assets, might lose his debt. The law intended to secure the creditors against this hazard, and looked only to the security of the personal assets.

The tenor of the statutes, then, indicates, not that the bond was intended to secure the proceeds of real estate devised to be sold, but the contrary.

What effect has our statutory provisions upon the subject of the sale of land devised to be sold, upon this question? It has been already seen, that the proceeds of such land were not, at the Common Law, in any case a testamentary subject, falling within the jurisdiction of the Ecclesiastical Courts; that an executor was not bound to put them into the inventory, nor to account for them to the Ordinary; and, that the Ecclesiastical Court had no jurisdiction to enforce the payment of a legacy, payable out of such proceeds. At the common law, in whatever order the executor might be bound at law or in equity, to apply the proceeds of land to the payment of debts, he acted in relation to that subject only as trustee. It was a trust su-

peradded to the office of executor, and not inseparable from it. For, even if they *refused the administration and to be executors*, they might still execute the will, in relation to the lands; and, if there were more than one executor, and one refused, and the other proved the will, they must both join in executing the trust. 14 *Vin. Abr. Devise, P. C. pl. 4, 7, 9*, and cases there cited. The statute of 21 *Hen. 8, ch. 4, § 1*, provided, that "when part of the executors of any persons making a will of lands to be sold by his executors, refuse to take upon them the administration," a sale and conveyance by such of the executors as accept the administration, shall be valid. This provision was made to obviate the inconvenience of one of the executors, refusing to act, and thus rendering it necessary, that the parties interested, should go into a Court of Equity for relief; but, did not change the character of the fund and render it testamentary. Indeed, in the same statute *ch. 5, § 5*, it was provided, that "if a man devise lands to be sold, neither the money thereof coming, nor the profits for any time to be taken, shall be accounted as any of the goods and chattels of such person deceased." This clause is a *proviso* in a statute regulating the fees of Ordinaries in granting probats and administrations, according to the value of goods and chattels, and may have been intended only to exclude the proceeds of land from being taken into the estimate of the estate, in regulating the fees. *Wentw. Off. of Exec. 73*. The statute of 21 *Hen. 8, ch. 4, § 1*, was in force in Virginia until the year 1785, when it was enacted here, that "the sale and conveyance of lands devised to be sold, shall be made by the executors or such of them as shall undertake the execution of the will, if no other person be thereby appointed for that purpose; or, if the person so appointed, shall refuse to perform the trust, or shall die before he has completed it." This was re-enacted in 1792, with this additional provision; "but, if none of the executors named in such will shall qualify, or after they have qualified,

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shall die before the sale and conveyance of such lands, then in these cases, the sale and conveyance thereof shall be made by such person or persons, to whom administration of the testator's estate shall be granted." Both of those acts, confirmed the sales theretofore made by Sheriffs under orders of Court, of lands devised to be sold. The act of 1785, in relation to lands devised to be sold, was a substitute for that of *Hen. 8*, and founded on the same policy to remove impediments to the execution of the trust, in relation to the sale of lands; but, went a step further, in providing that if another were appointed to execute the trust, and not refusing, died before it was completed, the qualified executor should perform the trust; and, the act of 1792, extended this policy still further, by authorising the administrator with the will annexed, to sell and convey. The sole object of these statutes seems to have been, to supply the want of a trustee, by a statutory appointment, instead of leaving the *causæ que trustis* to proceed in such cases in a Court of Equity for relief. They obviously indicated no intention, that the proceeds of land should be embraced in the executor's hand. For, if another were appointed by the will to sell the land, and had undertaken the trust, the executor could not be required to give security, both for the personal estate and the land; the latter of which, might be ten times the value of the former; and, yet the execution of the trust might devolve on the executor by the death of the trustee. Nor, did these statutes, in any degree, change the quality of the fund proceeding from the sale of lands, in the hands of the executor, in respect to its character as legal or equitable assets. Before the statute of fraudulent devises, 3 *W. & M.*, which was adopted in Virginia in 1796, 4 *Hen. Stat. Large* p. 164, and re-enacted in 1785, the Courts of Law in England had decided, that in some cases, money in the hands of executors, arising from the sale of land, was assets, which creditors might pursue in a Court of Law, and to be there administered, so far as

creditors were concerned. But, that statute, whilst it avoids devises which prejudice creditors, and gives a legal remedy against the devisee, excepts all devises in any form for the payment of debts, and declares that those for whose benefit the devise was made, and their trustees, shall hold according to the devise. This seems to have converted the proceeds of land devised to be sold for the payment of debts, into an equitable fund which could be pursued only in a Court of Equity. 1 *Fonb. Eq.* 292, n. 1; and, in *Nimmo v. The Commonwealth*, this Court in effect decided, that in no case could a creditor claim against an executor the proceeds of land in a Court of Law. Whether there may or may not be cases, in which a Court of Equity would distribute such a fund in the payment of debts, according to their legal priorities, we give no opinion. A debtor might, however, if he pleased, create a trust fund for the payment of his debts, according to their legal priorities, which a Court of Equity would enforce.

But, it is said, that it is, and always has been, the general understanding of the country, that the sureties of an executor are bound for the proceeds of real estate, and that *communis error facit jus*. We know not how this fact may be; but, we doubt whether such an error could bind the sureties beyond the terms of their obligation. For 150 years, the practice had been to render judgment against the deputy Sheriff failing to return bail, on a writ requiring bail, under the statute authorising such judgment against the Sheriff failing to return bail; and this was at least equitable. For, if judgment were entered against the Sheriff for the default of his deputy, the latter was liable over to the Sheriff. Yet this Court said, that the practice was unlawful, and corrected it.

Upon this point, we are of opinion, that the proceeds of land devised to be sold, are not, and never were, a testamentary subject: that executors hold such proceeds not in their character of executors, but as trustees: that the literal terms of the executor's oath and bond, binds him only

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1824. in relation to the goods, chattels and credits of his testator:
June. that there is nothing in our legislation on this subject, which
Jones indicates an intention that the obligation should have a
v. greater extent, but the contrary; and that the sureties of
Hobson. an executor are not responsible for the proceeds of lands sold by him.

The next question is, whether the sureties of the executor are responsible for waste committed by the executors of the executor, in the administration of the assets of the first testator; or whether the executor, by directing that his executors shall not give security, thereby makes his sureties so responsible.

The direction that the executors of the executor shall not give security, can be no prejudice to the creditors or legatees of the first testator; because, if they gave security, it would only be for the administration of the assets of their immediate testator; and the bond would not avail the creditors and legatees of the first testator, to any purpose.

The executor of an executor is the immediate executor of the first testator, claiming his legal right as executor, not by virtue of the will of the executor, but of the will of the first testator. 11 *Vin. Abr.* 421, pl. 6. Every will appointing an executor, gives him an implied authority to continue the executorship, by appointing another; and when appointed, the executor of the executor claims immediately under the first testator, and derives no interest in the goods of the first testator, under the will of the first executor. It is therefore, that if the first executor undertakes to dispose of the goods of the first testator by his will, the executor of the executor may take them as executor of the first testator, and administer them as such, even if he had assented to the legacy, and might at the common law, renounce the execution of the will of the first testator, and accept that of the second testator. 11 *Vin.* 422, pl. 14, notes; *Burns' Eccl. Law*, 4th vol. p. 190. And it is for this reason, that a *feme covert* executrix may appoint an executor, who will be the executor of her testator, even with-

out the consent of her husband. But, such executor cannot be executor of her goods. As to these she is dead intestate, the will being void, and the husband is entitled to administration of her goods. A *feme covert* cannot bind herself by any act; and all her acts to the prejudice of her husband, are void. Therefore, her will as to her own goods, being to the prejudice of her husband, is void; but her will, so far as it appoints an executor of her testator, is valid; because it is no injury to her husband. If her estate were liable for the *devastavit* of her testator's estate, by the executor appointed by her, then her husband might be prejudiced, and responsible out of her assets, for such waste. *Bac. Abr. Legacies and Devises, A. Wentw. Off. of Exec. 199. Toll. Law of Exec. 242.* The exercise of this power of appointment cannot be a *devastavit*, even if the executor of the executor should waste the estate of the first testator. But if this were otherwise, and the estate of the executor would be responsible in such case, his sureties would not. Their obligations are limited by the bond, and that stipulates, that the executor will administer according to law, the assets which come to his hands. The assets, which come to the hands of the second executor and were never in the hands of the first, are not embraced by the terms of the bond; for they come to the hands of the second executor, by virtue of his office of executor of the first testator, and not as executor of the first executor.

The sureties insist, that they are discharged from responsibility, by the admission of the executors of *John McRae, jr.*, that they had received, of the assets of *John McRae, sen.* which had come to the hands of *John McRae, jr.*, sufficient to pay the legacies. They are, it is true, discharged from liability to account for the assets, which so came through the hands of *John McRae, jr.* to those of his executors; but not for such as were received by *John McRae, jr.*, and wasted or converted to his own use. The bond binds them for the legal administration of the assets which came to the hands of their principal, and any portion of

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them which went into the hands of his executors in kind, was legally administered. As soon as they received them, they held them as executors of *John McRae, sen.*, and were accountable for them as such; and not as executors of *John McRae, jr.* If *John McRae, jr.* had died intestate, and his administrator had delivered the assets of *John McRae, sen.* in kind to the administrator *de bonis non* of *John McRae, sen.*, that would have been a lawful administration of so much, and would, to that extent, have discharged the sureties of *John McRae, jr.* The creditors and legatees are entitled to look to the whole estate for satisfaction; and the responsibility of the executors of *John McRae, jr.* for the assets in their hands, cannot deprive them of their resort to the bond of *John McRae, jr.*, so far as the same has been broken by wasting or appropriating to his own use, a part of the assets of his testator, and which could not come to the hands of the second executors.

Let us apply these principles to the case at bar; and see whether enough appears in these records to charge the sureties with the legacies claimed by the appellees. It appears by the affidavit of the sureties, and the statement and accounts referred to by the affidavit, that *John McRae, jr.* received, by collections, of the personal assets of his testator,

\$82,800 89

And the proceeds of real property,

13,800 36

\$96,601 25

And paid debts to the amount of \$43,177 98

And legacies to the amount of 25,648 04

68,826 02

Leaving a balance in his hands of

\$27,775 23

This balance, being money which could not go as the assets of his testator to his executors, he must be considered as having wasted or converted to his own use, subject, however, to a deduction of the commissions and expenses of administration, which do not appear to have been de-

ducted; and the whole of this balance should be considered as personal assets, for which his sureties are responsible. For, the will of his testator gave him no authority to sell lands for any other purpose than the payment of legacies, *Powell v. Robins*, 7 Ves. 209; and, having sold lands to the amount of \$13,800 36, which he received, and having paid legacies to a larger amount, he must be presumed to have applied the proceeds of the land to their proper object, the payment of legacies, until the contrary appears. If any of those proceeds have been otherwise applied than in the payment of legacies, the sureties would not be responsible for such mis-appropriation; and in that case, a larger part of the personal assets would appear to have been applied to the payment of debts. This balance of \$27,775 23, with interest, subject to the deductions aforesaid, is, as far as distinctly appears from these records, the whole extent of the liability of the sureties. And, as there were, when these bills were filed, legacies besides those claimed by the appellees still due, to an amount exceeding \$40,000; and, as the subsistence of two infant legatees, and the annuity to Mrs. *Claiborne* of £50 *per annum*, during life, were to be provided for, over and above the legacies claimed by these parties, and the forty thousand dollars; it is obvious, that the fund for which the sureties were responsible, was not sufficient to pay all; and all the legatees had a right to have this fund rateably distributed amongst them, since it might be the only available fund for the payment of their legacies. And, therefore, the other legatees should be made parties, unless it hereafter appears to be unnecessary, by ascertaining that the available funds of the estate are sufficient to pay all. But, it appears, that the subsistence of the infant legatees, and one of the legacies of \$20,000, has been paid out of the trust-fund, pledged for the indemnity of the sureties. If it appeared that these payments had been made, out of the funds properly belonging to *John McRae, jr.*, and which he might lawfully pledge for the indemnity of his

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sureties, they would be entitled to a credit, to that extent, against their liability on account of the waste of the personal assets, by *John McRae, jr.* But, on the contrary, if these payments were made out of property belonging to the estate of *John McRae, sen.*, pledged by *John McRae, jr.*, or his executors, to indemnify his sureties, they could have no such credit, whether the property so applied was real or personal. For, *John McRae, jr.* and his executors, could not properly pledge any property of his testator, to indemnify his sureties against his waste of other property, or for his own debts; and thus withdraw it from the claims of the legatees. As to any personal property, so pledged by *John McRae, jr.*, the legatees might elect to consider it as a *devastavit* by *John McRae, jr.*, since his deed prevented the legal title from passing to his executors, and the property from being administered by them as the property of *John McRae, sen.*, and might charge his sureties for the value thereof; in which case, the latter would be entitled to a credit for so much of the proceeds of such personal property, as was duly applied to the payment of the debts or legacies of *John McRae, sen.*; or the legatees might elect, in equity, to claim the property and its profits and proceeds, to be applied to the payment of their legacies; the conveyance being a breach of trust by the executor, in which the sureties participated.

The records in these cases do not enable us to ascertain how much of the trust-fund was the property of *John McRae*, the elder, and how much, of *John McRae*, the younger. The bill of the sureties, in one of the cases, alleges, that a part of the trust-fund belonged to *John McRae*, the elder. Some of the land was of that description; and the slaves and turnpike stock, conveyed for the benefit of the sureties, and the bank stock conveyed for the indemnity of the sureties of *John McRae, jr.*, for his debt to the residuary legatees, may have been of that description. We cannot, however, ascertain that they were. We think that the balance due upon the legacies claimed

by the appellees, was sufficiently ascertained to charge the appellants. By the will, each of them was entitled to £1,000, and credits have been given according to accounts furnished by the executors of *John McRae, jr.*; and the appellants did not alledge that any other payments had been made. It is unnecessary to enquire, whether the accounts taken in the other causes, in which the appellants were parties, are evidence against them in this; since the case must go back to the Court below, and the necessary accounts be now taken.

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The decrees must be reversed, and the cause remanded for proper accounts to be taken, for ascertaining the extent of the liability of the sureties, and for a proper disposition of the sum, for which they may be responsible according to the foregoing views.

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An executor claims a sum of money advanced to him by his testator in his lifetime, as a *gift*, and not a *loan*; this claim will not be allowed upon the executor's own oath, and slight circumstances.

Willt shall be deemed a legacy in disguise, and therefore not sufficient to bar the widow of her right to one-third of the personal property so given.

Where a decree is made against an executor for having paid the assets improperly, he may be subjected in the first instance, without resorting to those who have so improperly received the assets.

This was an appeal from the Court of Chancery of Williamsburg.

John Owens died in 1820, leaving real and personal estate, and a widow, (the appellee,) and several children and grand-children. He also left a will, by which he bequeathed his property to his children, grand-children, and

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other persons. To *David Ruth*, his grand-son, (the appellant,) he gave a legacy of \$1,000, and appointed him an executor with *James Hodges*; the latter of whom died before the testator, and *Ruth* qualified as sole executor.

Elizabeth Owens, the widow, filed her bill against *Ruth*, and the other children and grand-children, claiming dower in the real estate of *John Owens*, and her just proportion of the personal estate.

Ruth answered, that his testator died in debt: that he had paid away, as executor, upwards of \$3,000, in discharge of debts due by bond, and in other ways, to different persons: that the testator, before his death, gave, not lent, (as the plaintiff had charged in her bill,) to the respondent, \$500, saying, in substance: "I give you this, as you have had a great deal of trouble in hiring out my negroes, &c.; but, as I may live to become poor, and you rich, you may give me your note for it, payable to me only, and I will call for the payment of it, only in that event:" that the respondent accordingly executed his note, payable five years after date; but the said note was never found among his papers; and the respondent supposes that the said *Owens* must have destroyed it, as the event had not happened, on which he was to claim the payment of it; and he declared his willingness to render an account of his administration.

The infant defendants answered by their guardian, referring to the answer of *Ruth*; and was taken as confessed against *Sally Hodges*, one of the defendants.

The Chancellor ordered an account of *Ruth's* administration.

The commissioner accordingly made up an account, in which he reported a balance in favor of *Ruth*. The plaintiff filed exceptions to the report, in the following particulars: 1. Because he had not charged the defendant *Ruth* for the sum of \$500, and interest, lent by the testator to the said *Ruth*. 2. Because he had given credit to the said *Ruth*, in his administration account, for the sum of

\$2,600, as for so much money retained for himself and *Sarah Hodges, Mary Carson, and Sally Burnham*, as creditors of his testator, on the notes executed by the testator to them respectively, shortly before his death, when these sums ought not to have been so credited; the said notes not being debts due by the testator, but being only disguised legacies, and received by the said obligees, as legacies, and not as debts, &c.

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The affidavits of *David Ruth, Anne Hayden, Elizabeth Hodges*, and others, were taken.

David Ruth swears, that the bonds or notes executed by *John Owens*, some short time before his death; one for \$100 to him the said *David Ruth*; one for \$1,000 to *Sally Hodges*; one for \$500 to *Mary Carson*; and one for \$100 to *Sally Burnham*, were all delivered by him the said *John Owens* to the said persons respectively, immediately after his signing the same; except that the one to *Mary Carson* was delivered to the affiant for her, (she not being present at the time,) and afterwards delivered by him to her accordingly.

Anne Hayden swears, that the four bonds, or notes, were executed by *John Owens* shortly before his death, as mentioned above: that the notes to *Ruth, Sally Hodges, and Sally Burnham*, were delivered by the said *Owens* to the respective parties, at the time immediately after they were executed, and two or three days before *Owens'* death: that the one to *Mary Carson*, for \$500, was delivered by the said *Owens*, at the time of the delivery of the above bonds or notes, to the said *David Ruth*, for the said *Mary Carson*, she not being personally present.

Elizabeth Hodges swears, that, two or three days before the death of *John Owens*, she was called upon to witness a bond or note to *David Ruth* for \$1,000; one other bond or note to *Sally Hodges* for \$1,000; another bond or note to *Mary Carson* for \$500; and another to *Sally Burnham* for \$100: that the said *Owens*, immediately after the execution of the said papers, delivered the notes to

1824. *Ruth, Burnham, and Hodges*, to the respective persons
June. to whom they were made payable; and the note to *Mary*
Ruth, &c. *Carson* was delivered to *Ruth*, for her; and *Owens* re-
v. marked that, live or die, he wanted the business done.
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The Chancellor decreed against *Ruth* for the proportion of the rents and profits of the real estate, to which the widow was entitled, and appointed commissioners to lay off her dower in the real estate, and slaves. And he further decreed, that *Ruth* ought to have been charged with the sum of \$ 500, lent to him by the testator, and therefore sustained the first exception: that the notes executed by the testator to *Ruth, Hodges, Carson, and Burnham*, ought to be considered only as means adopted to defeat and elude the claims of the plaintiff: that they did not create a debt absolutely and irrevocably due, and payable by the testator to these persons, being meant to secure the payment of the legacies intended to be left to those very persons by his will,* and were, in their nature, testamentary, and revocable. He therefore decreed, that the said plaintiff should recover against the defendant *Ruth*, \$866 66, being one-third part of the said notes, with interest from the 1st day of January, 1822, till payment, &c.

From this decision, the defendant *Ruth* obtained an appeal.

Leigh, for the appellant.

Wickham, for the appellees.

June 11. Judge CARR, delivered his opinion.

This is a bill filed by the widow of *John Owens* against the executor, devisees and legatees, claiming her dower in the real estate, and her portion of the slaves and other personal estate. Answers were filed by the defendants.

* These several sums were left as legacies, in the will.

The Chancellor appointed commissioners to lay off the widow's dower in the lands, and her third of the slaves; and, sent the administration account to a master to settle and report. The report was returned with exceptions. The Chancellor considered them, settled the principles of the case, and re-committed the account, for a more special report as to the same points. From this order, the appeal is taken. There are two points in dispute; 1st. The sum of \$ 500 charged in the bill to have been a loan from the testator to *Ruth* the executor. *Ruth*, in his answer, claims this as a gift: that his grand-father, some time before his death, gave him the money, saying, "I am now rich, you are poor; should our circumstances be reversed, you must return this:" that, with this understanding, he received the money, and executed a note; which, not being among the testator's papers, he presumes was destroyed, because it was never intended to demand the money. Two witnesses say, that about three years before the testator's death, while *Ruth* was in the western country, they frequently heard him say he had given *Ruth* \$ 500, and if he made a good use of it, would give him \$ 500 more. This is all the evidence on that point. Not a word is said about this money in the will, although it contains devises and bequests to *Ruth* of much other property; particularly, the sum of \$ 1,000. The will too is made about three years before the testator's death; probably, near the time of the loan of the \$ 500. It may be, that the testator considered this as part of the legacy, and that the other \$ 500, mentioned by the witnesses, was intended as the residue. This, however, is but conjecture. The commissioner refused to charge this \$ 500 as a part of the testator's estate to be accounted for by the executor. An exception was taken on this ground, and sustained by the Chancellor.

I felt some doubt at first, whether this was not intended as a gift; but further reflection has satisfied me, that the Chancellor was right. The evidence was too

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slight to establish a gift; especially, as *Ruth* was present to the testator's mind in making his will, was the object of his bounty; and, he would hardly have omitted this \$ 500, if he had intended to add it to his other bequests. It would be dangerous to suffer an executor, under such circumstances, by his own oath, and evidence so slender, to set up a claim to a part of his testator's estate.

The next point is, with respect to four notes executed by the testator, one to *Ruth* for \$ 1,000, one to *Sarah Hodges* for \$ 1,000, one to *Mary Carson* for \$ 500, and one to *Sally Burnham* for \$ 100. The executor discharged these notes, and claimed a credit for them as for debts of the testator. The commissioner allowed the credits. This was excepted to, and the exception sustained; because, the notes were legacies in disguise. They were given to the same persons to whom, in his will, the testator had left legacies of the very same amount; and, some of the witnesses proved, that when he executed the notes (about three days before his death,) he declared that it was to reduce the legacies. This point, indeed, is too clear for doubt or remark, and was very properly abandoned in the argument.

But it was contended, that in allotting to the widow her share of these sums, the Chancellor ought not, in the first instance, to have decreed against the executor; but (having all the parties before the Court) ought to have decreed against the payees of the notes, the widow's proportion of the money, which each of them had received. It was said, that this would prevent multiplicity of actions, would put the saddle on the right horse; and that this was the course adopted and settled by the Court, in the late case of *Chamberlayne v. Temple*. *Stare decisis* is a safe and sound maxim, and I should be among the last to counsel a departure from it. I have, therefore, examined the case of *Chamberlayne v. Temple*, determined, if I found it governing the present, to submit at once my private judgment to the rule settled by the Court. But I have found

it a case so materially differing from this, as well to warrant a different course of decision. There, *Temple*, a creditor, sued the administrator of *Chamberlayne*, and recovered judgment. Finding no assets to satisfy his debt, he filed a bill against the administrator *de bonis non* of *Chamberlayne*, and some of his children, to whom he had by several deeds, conveyed sundry slaves; alledging, that these conveyances were voluntary and fraudulent as to creditors of the donor; and praying, that the slaves might be subjected to the payment of his demand. Here we see, that the sole end of the bill was, a decree against the slaves in the hands of the donees. The personal representative of *Chamberlayne* was brought before the Court, not for a decree; but merely because, as the creditor assailed the conveyances on the ground of a defect of assets in the donor, it was proper that the personal representative should be in Court. The Chancellor's decree was general, that the deeds were fraudulent and void, and that the property be surrendered, to be sold for the satisfaction of the judgment. In the argument of the case here, it was objected that the donees ought not to have had a general decree against their property; but should have been subjected to a rateable contribution for the satisfaction of the judgment; and the Court did, in that particular, reform the decree, taking care to state, in the most special manner, the reasons applicable to that particular case, which induced them to do so. I think it will be seen at once, that the case before us is materially different. The widow calls on the executor for her share of the personal estate of her husband. The executor says, "I have paid away such and such sums, to satisfy creditors. Of this you can have no portion." The Court decides that these were *not debts*; and, in relation to the widow, form a part of the personality. But, says the executor, "although I have paid these monies wrongfully, yet I *have* paid them; and the decree ought to be, not against *me*, but against those who have received the money." The answer is, "Your wrong-

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ful payment is no payment at all. *You are the personal representative, and liable to the claimant; nor can you, by a misapplication of the funds, shift off that liability."* And this general answer applies with particular force to the case before us; for it is clear, that there has been no surprise in this business. The executor, when he paid off these notes, knew well that the payment of them as debts would be disputed. The receipts he took, prove this. They state that he paid them in satisfaction of the legacies given by the will; *his own* being one of them. *If he had not chosen to take upon himself the risque of the payment,* he might have brought the parties into equity, to litigate the matter. Under these circumstances, I think the decree was properly rendered against him, and ought to be affirmed.

The other Judges concurred, and the decree was accordingly affirmed.

1824. *June.* **M'MAHON and others v. FAWCETT and others.**

Where there are several sureties to a bond, and the principal conveys property in trust to indemnify some of them, and the rest are not provided for in the deed, the sureties who are so omitted shall, nevertheless, be protected by the deed of trust.

This was an appeal from an interlocutory decree of the Superior Court of Chancery of *Staunton*.

The bill was exhibited by *M'Mahon, Crummev, Rutherford, Effinger, Martz, Bird, and I. Peale*, administrator of *B. Peale*, deceased, setting forth, that they, together with *G. W. Harrison, R. Harrison, Sites, Shipman, Smith, Gambill, Fawcett, Fletcher, Waterman, Pence, and Reader*, were the official sureties of *Daniel*

Ragan, deputy of *Walter Davis*, Sheriff of *Rockingham*; that the sureties had sustained heavy losses, and were likely to suffer more; and that *Ragan* had executed a deed of trust of 900 acres of land in *Rockingham*, and some personalty, to indemnify all his official sureties. That *Ragan* had become insolvent; and the plaintiffs, as his sureties, had been compelled to pay large sums of money, and were liable for other large sums. That the personalty pledged for their indemnity was subject to prior incumbrances far beyond its value. That the land was also subject to prior incumbrances, viz: 1st. A deed of trust executed by *Ragan* to *W. Herron*, dated May 13, 1818, to indemnify *R. Gray*, as *Ragan's* endorser at the Valley Bank. 2d. Another deed of trust executed to *Herron*, dated September 24, 1819, to secure to *Gray* several debts of \$ 600, \$ 1,200, and \$ 400, with interest. 3d. A deed of trust executed by *Ragan* to the same *Gray*, for the benefit of *Gambill* and *Fawcett*, dated January 24, 1820, which, reciting, that *Gambill* had become *Ragan's* surety to *John Rush* for \$ 800, to *Jacob Rush* for \$ 400, and to *M. Doubt* for about \$ 200: that *Fawcett* was his surety to *E. Nichol* for 400 dollars, to *B. Kite* for 650 dollars, to *D. Smith* for 1,300 dollars, to *M. Sheeler* for 1,300 or 1,800 dollars, to *R. Gaines* for 200 dollars, to *T. Scott* for 1,000 dollars, and to the Valley Bank for 2,700 dollars; that, possibly, *Gambill* and *Fawcett* might be sureties for *Ragan* for other debts, (exclusive of their suretyship for him as deputy Sheriff;) and that the intention of the deed was, to indemnify *Gambill* and *Fawcett* against all their private suretyships for *Ragan*, whether therein specified or not; provided, that if *Gambill* and *Fawcett*, or either, should be compelled to pay any monies by reason of such, their private suretyships for *Ragan*; in that event *Gray*, the trustee, at the request of *Gambill* and *Fawcett*, or of whichever should be so compelled to pay such monies, should sell so much of the land as would suffice to satisfy such sums as they, or either, should have been compelled

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to pay, and to defray expenses. The bill then proceeded to charge a fraudulent and collusive sale under the *last mentioned* deed of trust; a sale *unauthorised* by the terms of the deed; and *designedly so conducted* as to prevent all competition, and to enable *Gambill* and *Fawcett* to purchase the subject at less than its value, and to defeat the indemnity provided for *Ragan's* official sureties; that, *in the first place*, the deed authorised a sale *only in case Gambill and Fawcett should be compelled to pay monies by reason of their suretyships for Ragan*: they had never been *compelled to pay any thing*. In *many of the cases* several other persons, in *one*, fifteen or sixteen others were bound as co-sureties with them: yet they voluntarily took on themselves the whole burthen. They *procured* suits to be brought against them by the creditors, to whom they were bound as sureties for *Ragan*; in several instances, they *procured* such suits to be brought against themselves alone, omitting their co-sureties, and even *Ragan* himself; in some cases, where *Ragan* was joined in the writ, *they* directed the process not to be served on him; and *then they confessed judgments* at the term to which the writs were returnable; but no executions were levied, nor any monies paid, though *Gambill* and *Fawcett* gave their own bonds to the creditors, with an understanding that they were to wait till the money could be raised out of the trust subject. In one instance, the bond was renewed to the creditor with exactly the same sureties bound in the original bond. One of these debts, (that to *Gaines*,) was *usurious*. Whether the others were justly due, or how much thereof was due, was unknown: the precipitate confession of judgments prevented all investigation. They pursued the *same* course in respect to three suretyships, not particularized in the deed, (for these, it was questioned whether the deed creates any lien,) in all which, others were jointly bound as sureties with them. All this was done to afford a *colourable pretext* for selling the trust subject *before they had suffered loss*. *Ragan* was, at first, very much dissatisfied

with these preliminary proceedings, but they *made arrangements with him*, which kept him quiet.

That, *in the next place*, *Gambill* and *Fawcett* had notice inserted in the advertisement of the sale, that the purchasers should pay the money within two hours after the sale; but they did *not insert* in the advertisement, another condition, that the money should be paid *in specie*; that they reserved till the instant of the sale, and then they gave notice by their crier, that payment *in specie* was expected, and would be insisted on.

That, *in the third place*, the sale was made, not for the joint benefit of both, but for the several benefit of each; and they arranged, between themselves and with the trustee, that *Gambill* should purchase part of the subject, and *Fawcett* the residue, at prices agreed on. Accordingly, 63 acres were first set up, and cried out to *Gambill's* bid, for \$1,873; and, then, the residue was set up and cried out to *Fawcett's* bid, for \$6,527 97; the crier, in each case, demanding, "who would give *more for less land?*"

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That, *in the fourth place*, though *Fawcett* and *Gray* were jointly bound as *Ragan's* endorsers to the Valley Bank, and though the sale was made to indemnify *Fawcett* on account of that same suretyship, and though a large part of that debt had been paid off; yet, it was proclaimed, that the sale was made subject to the incumbrances of *both* the deeds of trust for the benefit of *Gray*, the *first* of which provided for *Gray's* indemnification on the very same account. That having, by these contrivances, completely excluded all competition, *Gambill* and *Fawcett*, between them, bought the whole land, worth between 25,000 and 30,000 dollars, for about \$8,400. And these contrivances were made in concert with *Gray*, the trustee; whose object was, not only to favour *Gambill* and *Fawcett*, and to defeat the indemnity of the plaintiffs, but to preclude enquiry as to the consideration of the debts secured to himself by the deed of trust of September 24th, 1819, two of which debts (those of 1,200 and 600 dollars,)

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&c.

were *usurious*; and the debt of 400 dollars was a debt due by one *Elá Harry* to *Gray*, for whom *Ragan* was bound only as surety, and *Harry* was perfectly solvent. That after the purchase of the *whole land* had been thus fraudulently accomplished, *Gambill* conveyed the 63 acres he had bought, and *Fawcett* 137 acres of that which he had bought, to *Richard Ragan*, father of *Daniel*; and *Gambill* took a deed of trust of the 200 acres from *Richard Ragan*, to secure him the whole amount he claimed on account of his suretyship, for *Daniel Ragan*. The bill made *Gambill* and *Fawcett*, and *Gray*, (their trustee,) *Gray*, (in his own right,) and *Herron*, (the trustee for *Gray*,) *Harry*, (*Gray's* debtor for the 400 dollars,) and *G. W. Harrison*, *R. Harrison*, *Sites*, *Shipman*, *Abr. Smith*, *Waterman*, *Fletcher*, *Reader*, *Pence*, (co-sureties for *Ragan*, in his official bond,) *Ragan*, the deputy Sheriff, and *Richard Ragan*, his father, *defendants*; and prayed, that the amounts for which *Gambill* and *Fawcett* were bound as sureties for *Daniel Ragan*, and which they had paid, might be ascertained; that the amount of the debts due *Gray*, and the consideration thereof, might be ascertained; that the land might be fairly sold for the benefit of *Ragan's* official sureties; and general relief.

Richard Ragan's answer states, that the 63 acres of land bought by *Gambill*, was purchased for him and at his request, and therefore conveyed to him by *Gambill*: that *Fawcett* also conveyed him 137 acres of the land he bought; but, in truth, a much larger portion of the land bought by *Fawcett*, was the property of this defendant; for, though he had given his son *Daniel* possession of it, and intended to devise it to him, he had never conveyed the title to him: that he, therefore, agreed to relinquish his title to all the rest, and to procure the relinquishment of dower of his own and *Daniel Ragan's* wives, in consideration that *Fawcett* would release and convey to him this 137 acres. It was the part of the land on which his son *Daniel* lived; and, he owned, that he meant it as a provision to keep that son from suffering.

Gambill's answer stated, that he was present when *Gray* lent *Ragan* \$ 1,200, secured by the deed of trust of September 24, 1819, and saw the money advanced; and, as to the sale made under his and *Fawcett's* deed of trust, *denied* that there were any unfair contrivances to prevent competition, to produce a sacrifice of the property, and to secure undue advantages, as imputed in the bill. That *Fawcett* had offered to give the official sureties the benefit of the deed of trust executed for his and *Gambill's* benefit, so far as he was concerned, if they would concur to relieve him from his *private* suretyships; and, they refused to accede to the proposal. That it was true, *Gambill* did give notice to the persons to whom he was bound as *Ragan's* surety, to bring their suits, and he had promptly discharged their claims: prompt proceedings were necessary to his security. That he bought 63 acres of the land, for the amount to which he had been subjected as *private* surety of *Ragan*; and, it was a *high* price: this part of the land was sold exempt from prior incumbrances; and *specie*, in payment of the purchase money, was *not* required at the sale of this 63 acres. That the terms of sale were stated in writing, and publicly read at the sale. That *Gambill* bought the 63 acres of land for *Richard Ragan*, (that parcel was designated by *Daniel Ragan*, according to the privilege reserved to him in the deed of trust;) he conveyed that parcel to *R. Ragan*; *Fawcett* also conveyed him 136 acres of the land he bought, (that much being really *R. Ragan's* property, though he had given his son *Daniel* possession of it, and devised it to him by his will,) in consideration that *R. Ragan* would release all claim to the residue of the land, and procure his own and his son's wives to relinquish their dower; and then, *R. Ragan* gave *Gambill* a deed of trust of the whole 200 acres, to secure the payment of the sum he had given for the 63 acres.

Fawcett's answer, gave the same account of the conveyance of the 137 acres by him to *Richard Ragan*, as

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1824. that contained in *R. Ragan's* and *Gambill's* answers:
June. *denied* all the charges of unfairness, collusion, contrivances to prevent competition, imputed by the bill to the sale under his and *Gambill's* deed of trust; and gave a minute detail of the whole transaction; that he had offered to give the *official* sureties all the benefit he was entitled to under that deed of trust, if they would relieve him from his *private* suretyships for *Ragan*, or join him therein; and, they rejected the proposal. That he and *Gambill* were bound for different debts. That he did require the persons to whom he was bound, to bring suits, but did not desire them to omit his co-sureties or *Ragan* himself. That he also confessed judgments, and discharged them by giving the creditors his own obligations; many of the debts, however, for which he was bound, were yet unsatisfied; some were still in suit; some had never been put in suit. That the judgments, thus discharged, amounted to 6,399 dollars 88 cts.; the land he bought at the sale, was sold to raise that sum: he was bound for much more: and he owned, that he wished to have the land sold in such a way, and to buy it at such a price as would enable him, by re-sales, to obtain full indemnity. That he did require that *specie* should be paid for the purchase money, as he had a right to do; not, however, to exclude fair competition; but, to prevent the interference of meddlers. That the land sold at its just value, considering the incumbrances on the title; which he detailed at large. That it was not sold to pay any part of the debt due to the Valley Bank, for which he and *Gray* were jointly bound, as endorsers; and, that debt was still due. That there was no arrangement made with *Daniel Ragan* for his benefit. That there was no usury in any of the debts for which he was bound as surety; and, the allegation in the bill concerning the debt due to *Gaines* was founded in mistake.

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Fletcher's answer stated, that he was one of the *private*, as well as one of the *official* sureties of *D. Ragan*:

and that *Ragan* had executed a deed of trust of the same land, to indemnify him from loss, by reason of his *private* suretyships, prior to the execution of the deed under which the *official* sureties claimed; and expressly acquitted *Gambill* and *Fawcett* of all blame, in every part of their proceedings.

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&c.

Pence's answer, acquitted *Gambill* and *Fawcett* of all blame; and added, that he was not *Ragan's* surety to the same extent with the plaintiffs, not being surety in his bond for collection of taxes; and that, for *most* of the *private* debts of *Ragan*, for which *Fawcett* was bound as surety, this defendant was also bound.

The answers of *Sites*, *Reader* and *Shipman*, *Waterman*, *R. Harrison*, and *Smith*, were not materially variant: some expressly, and in strong terms, acquitted *Gambill* and *Fawcett* of all blame; others disclaim all knowledge, and all suspicion of the misconduct imputed to them.

Harry's answer stated, that it was true that the \$ 800 due to *Gray*, was originally his debt to *Gray* for rent, for which *D. Ragan* was bound as his surety; but, in the course of dealings, (particularly detailed,) *Ragan* became *Harry's* debtor for \$ 620; and, in consideration thereof, and that *Ragan* had never made any advancement to *Harry's* wife, who was his daughter, *Ragan* assumed to pay *Gray* the \$ 800.

Daniel Ragan's answer stated, that the debts secured to *Gray* by the deed of trust of September 24, 1819, were fairly due, and none of them usurious; and confirmed the account given in *Harry's* answer of the particular debt therein mentioned: that this defendant was, at first, dissatisfied with *Gambill* and *Fawcett's* proceedings, but that dissatisfaction ceased, on an assurance being given him by *Fawcett*, that whatever part of the land he should purchase, should be again sold, on a credit, and the proceeds applied, as far as they would go, to the payment of *Ragan's* debts: that there was no unfairness in the sale made

1824. under *Gambill* and *Fawcett's* deed of trust; no arrangement
 June. was made with them for his (*D. Ragan's*) benefit: his fa-
 M'Mahon, ther purchased the parcel of 63 acres, and the 137 acres
 &c. was conveyed to him by *Fawcett*; and permitted him to
 v. keep possession of it, and he hoped would continue that
Fawcett, kindness; but the property belonged to his father.
 &c.

Answer of *Herron*, trustee for *Gray*, stated, that he was present when the \$1200, secured by the deed of trust of September 24, 1819, was advanced by *Gray* to *Ragan*: that the sum was actually lent by *Gray* to *Ragan*.

Gray's answer denied all unfairness, collusion, contrivances to prevent competition, in the sale made by him as trustee for *Gambill* and *Fawcett*; gave a history of that transaction, corresponding with that given by *Gambill* and *Fawcett* in their answers; and exhibited the written terms of sale, which were read and proclaimed at the time. It was true, the crier did make some such blunder in stating the terms of sale, as that mentioned in the bill; but it was immediately corrected, and no body was deceived by it. In the sale of that part which was sold for *Fawcett's* benefit, specie payment was required at *Fawcett's* instance: the trustee obeyed *Fawcett's* instruction in that particular, with reluctance; but he conceived that *Fawcett* had a right to dictate that condition. It was not true, that *Ragan's* debt to the Valley Bank, for which he and *Fawcett* were jointly bound as endorsers, had been paid. And, with regard to the deed of trust of September 24, 1819, the debts thereby secured to *Gray*, were justly due to him from *Ragan*, and in no wise tainted with usury.

General replication to all the answers.

In this stage of the proceedings, the plaintiffs exhibited a petition; in which, after briefly recapitulating the purport of their bill, they set forth, that *Fawcett* had, pending the suit, laid off the land bought by him into lots, and sold several of them to the defendant *Sites*, who had sold parcels to *G. Wertenbaker*, *J. Irick*, *P. Irick*, and *J. Peters*: that *Fawcett* had also sold part of the land to *John*

Bader, another defendant; retaining the residue to himself: and that *Fawcett*, *Rader*, *Sites*, and the purchasers under *Sites*, were all committing great waste on the land. Wherefore, they prayed an injunction to stay waste, and general relief. The injunction was awarded.

Shortly afterwards, the plaintiffs, with leave of Court, exhibited a supplemental bill, setting forth, that pending the suit, *Gray* had caused his trustee, *Herron*, to advertise the land for sale, under his deed of trust of September 24, 1819; a proceeding, calculated to perplex yet more the already confused state of the controversy, and designed to favour *Gambill* and *Fawcett*, and to render illusory any relief the Court might decree the plaintiffs. That *Fawcett* too, had caused the land to be advertised for sale as *Ragan's property*, under the deed of January 24, 1820, to satisfy the debt due the Valley Bank; a proceeding, inconsistent with all his former pretensions, since he had heretofore insisted on the former sale, and claimed the land under it, as his own. That *Fawcett* had sold *Gray* a part of the land bought by him at the sale, which the bill sought to set aside; and, that a large portion of the debt to the Valley Bank had been paid. That *Gray* was an improper person to act as trustee, being counsel, party and partizan in the controversy. That the deed of trust, under which *Gambill* and *Fawcett* claim, was obtained of *Ragan*, by the exertion of an undue influence over his mind, and delusive representations, and was contrary to his own declared sense of justice towards his official sureties. That among the debts which *Fawcett* had stated as a pretext to justify the former sale, was a debt due one *Yancey*, assignee of *Price*, which had been enjoined as usurious, at *Fawcett's* instance; and another debt, due to *Nichols*, who had expressly agreed to give indulgence, if the interest were paid him, which had been paid him accordingly. And the plaintiffs made these new allegations against *Fawcett*; that he was collector of the United States, recovered divers judgments in Rocking-

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1824. ham Court, against distillers, &c., and put executions in
June. *Ragan's* hands, during the time for which the plaintiffs
M'Mahon, were his sureties; *Ragan* paid *Fawcett* monies, to be ap-
 &c.
v. plied to the credit of those executions; but *Fawcett* ap-
Fawcett, plied them in discharge of private claims he had against
 &c.
Ragan; and then moved for, and recovered, the amount
 against *Ragan's* official sureties, who were utterly igno-
 rant that such payments had been made. And that *Ragan*
 had, since the sale of his land, placed in *Fawcett's* hands,
 bonds and other evidences of debt, to a large amount, to
 be applied to *Fawcett's* indemnification. This bill pray-
 ed a particular answer to the new allegations; an injunc-
 tion to prevent the new sales advertised by *Gray* and
Fawcett; and general relief.

The injunction was awarded.

Gambill's answer denied the undue influence on *Ra-
 gan's* mind, imputed to him and *Fawcett*, in obtaining
 the deed of trust under which they claimed; and stated,
 that *Price's* debt was not one of those, which composed
 the amount due to *Fawcett*, on account of which the sale
 had been made, and that this was known to the plaintiffs,
M'Mahon and *Crummey*. That, as to the executions
 on behalf of the United States, *Ragan* had stated that he
 had made deposits of money with *Fawcett*, on account of
 those executions; but, *Fawcett* denied the fact, and ex-
 plained the business to *Gambill's* satisfaction.

Fawcett's answer contained the same matters stated in
Gambill's; and, in addition thereto, denied that he had
 sold any part of the land to *Gray*, and insisted on having
Gray to act as trustee. He stated, that a large portion of
 the debt due the Valley Bank, still remained to be paid,
 and the note for it had been protested; and that, to satisfy
 this debt, he had caused the property to be advertised un-
 der the deed of January 24th, 1820, not because he dis-
 trusted his title under the former sale, but because there
 could be no dispute about his right to have the subject sold
 to satisfy this debt. He denied the waste charged in the

petition; he denied the allegations of the supplemental bill, concerning the additional funds charged to have been put into his hands by *Ragan* for his farther indemnity; and concerning the executions on behalf of the United States, and the payments charged to have been made him by *Ragan* on that account, and otherwise applied. On this last subject, he gave long details, and exhibited numerous accounts and documents, which can only be rendered intelligible by an account taken before a commissioner.

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Gray's answer insisted on his right to enforce a sale of the trust subject, to pay the *just* debts due him, according to his deed of trust of September, 1819; and *denied* all collusion or concert with the other defendants. He had bought no part of the land from the defendant *Fawcett*.

The answer of *the executors of G. W. Harrison*, to the *original* and *supplemental* bills, stated, that their testator was one of *Ragan's* official sureties; that he had a lien on the land sold to *Fawcett*, for part of the purchase money due from *Ragan* therefor; that he had made known this claim to *Fawcett* at the time of the sale, and *Fawcett* had promised to settle it; but had since refused to do so.

Rader's answer to the *supplemental bill* and the petition, denied the waste imputed to him; and declared, that the purchase he had made of *Fawcett* was made with the knowledge and approbation of most of the plaintiffs.

Sites's answer stated, that he had bought 36 acres of the land, of *Fawcett*; and had sold about 15 acres, and been compelled to take it back again, in consequence of the proceedings to stay waste: he denied the waste, and declared, that, instead of committing waste, he was making improvements.

Daniel Ragan's answer stated, that he had paid nothing towards the debt due the Valley Bank, since the sale under *Gambill* and *Fawcett's* deed of trust: he had, thenceforth, regarded *Fawcett* as the principal; the balance then due was 2,348 dollars. He did pay *Fawcett* several large sums of money, which, according to his intention and understand-

1824. ing were to be applied to the United States' executions. He
June. had not put in *Fawcett's* hands any such funds as were
M'Mahon, mentioned in the supplemental bill. He executed the deed
&co. of trust for *Gambill* and *Fawcett's* indemnity, freely and
v. cheerfully. The debts secured by *Gray's* deed of trust
Fawcett, were just and fair; and that security was not extorted from
&co. him.

Chancellor BROWN, held:

1. That *G. W. Harrison's* executors had an undoubted prior lien on the land, for the balance of purchase money due for the same.

2. That the debts due *Gray* were fair, and entitled to priority; and *Gray* had a right to require a sale of the trust subject.

3. That the parties interested had a right to have the subject sold for cash, to satisfy the debt due to the Valley Bank; and the Court had no power to interfere.

4. That the charge of *waste*, was unfounded.

5. That *Gambill* and *Fawcett's* deed of trust, did not provide any security for their co-sureties for *Ragan*; so that, whatever monies were paid by *Gambill* and *Fawcett*, in cases where co-sureties were bound with them, over and above their just proportions thereof, unless they were compelled to make such payments, or unless their co-sureties were unable to contribute their proportions, were not properly chargeable on the trust fund.

6. That the deed of trust under which *Gambill* and *Fawcett* claimed, did protect them as well against suretyships for *Ragan*, not particularly specified, as those which were specified therein.

7. That the sale made under *Gambill* and *Fawcett's* deed of trust, was not authorised by that deed; because they had never, in any sense, been compelled to pay any money as sureties for *Ragan*; the suits having been instituted against them by their own procurement, and the judgments which they had satisfied, confessed.

8. That *Richard Ragan* had a just title to that part of the land, held by his son *Daniel*, which he claimed; and the compromise made with him by *Fawcett*, according to which, 137 acres of the land had been released and conveyed to him, was highly beneficial to all parties.

And because that compromise depended on the confirmation of the sale under *Gambill's* and *Fawcett's* deed of trust; and because a majority of the official sureties, did not concur in the wish to set that sale aside, but were satisfied with the terms proposed by the defendant *Fawcett*, which terms had been suggested by the Court, and were approved as reasonable and beneficial to all parties; therefore, the Court decreed:

That the injunction to stay waste, should be dissolved: That the sale made under *Gambill* and *Fawcett's* deed of trust should be confirmed: That the compromise with *Richard Ragan*, and the conveyance to him, [should be confirmed: That the sales of parts of the land, since made by *Fawcett*, should be confirmed: That *Fawcett* should be regarded as trustee for the benefit of the incumbrancers, and should account for the proceeds of sales already made by him, and of those thereafter to be made: That he should be permitted to go on and sell the residue of the subject, on the best terms he could; always submitting his sales to the Court for its approbation, and the Court reserving the power to substitute another trustee: That the proceeds of sales, after reimbursing *Fawcett* his expenses, and compensation for his trouble, should be applied; 1st. To the discharge of prior incumbrances; 2d. To the indemnification of *Fawcett* to the extent to which the Court held him entitled to indemnification; and last, to the satisfaction of other incumbrances, in due order and proportion: That *Fawcett* should render accounts of the subject, from time to time: That accounts be taken, before a commissioner, of the monies already paid by *Gambill* and *Fawcett*, and those for which they were yet bound, as *Ragan's* sureties; shewing what portion thereof was justly due by *Ragan*, for

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1824. what debts they were sole sureties, and for what they were
June. jointly bound with other sureties; and whether those other
 M'Mahon, co-sureties were solvent—also, accounts of all debts charged
 &c. on the trust subject; of all debts paid by *Ragan's official*
 v. sureties; of the proceeds of all sales of the trust subject,
 Fawcett, made or to be made, by *Fawcett*; and of all monies paid
 &c. by *Ragan*, as deputy Sheriff, to *Fawcett*, as United
 States' Collector, and the appropriation of the same.

From which decree, the plaintiffs appealed to this Court.

Leigh, for the appellants.

Johnson, for the appellees.

June 11. Judge CARR, delivered his opinion, in which the other Judges concurred.*

This is an appeal from an interlocutory decree of the Staunton Chancellor. The suit was brought by seven out of seventeen of the sureties of *D. Ragan*, as deputy Sheriff of Rockingham, against *Fawcett* and others, the sureties of the same *Ragan*, in his private capacity. It is a scramble between these two classes of sureties for the wreck of an insolvent's estate. In canvassing the correctness of the Chancellor's decree, it may be best to treat the subject in the order he has pursued.

1st Question. Does the trust deed to *Gambill* and *Fawcett*, afford protection to those who were bound as sureties with them? The Chancellor thinks not. He places it principally on the ground of contract and intention. The deed clearly on the face of it provides only for the payment by *Gambill* or *Fawcett*; and indemnity to them is its sole object. It gives no *lien* to the other sureties. They are not even parties to it. And here the case differs in the Chancellor's opinion, from *West v. Belches*, 5 Munf. 187; where there was once a *lien* for the whole debt to both

* Judges BROOKE and GREEN, absent.

sureties, though that lien was afterwards abandoned, by the surety to whom this Court gave protection under it. The examination which I have given to this subject, has conducted my mind to a conclusion different from the *Chancellor's*. I think that, both upon principle and authority, the co-sureties have a right to throw the whole burthen of the debts upon the subject mortgaged to one of their body for his security. I do not consider this so much a question of intention or contract, as of the effect of the deed, under the influence of those settled principles of equity, which bear upon it. All the obligations given, by *Ragan* and his sureties, are joint and several. Each is under a several obligation to pay the whole. The creditor may throw the whole burthen upon any one of them. The principal has given to two of the co-sureties, *Fawcett* and *Gambill*, a deed of trust on land, for their indemnity; and if the whole money be made out of either of them, the land must be bound for the whole, to indemnify them. Here, then, is the property of the common debtor, bound for the debt; and the question is, will not the established principles of equity throw the whole burthen upon that fund, in ease of all the sureties?

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There are several rules on this subject, which seem to me connected with each other, and resting upon the same general grounds. If B. and C. are bound to A. for a debt, B. as principal and C. as surety, and B. gives C. a mortgage or other *lien* to secure him, A. can resort to this. 1 *Equ. Cas. Abr.* 93; 5 *Bac. Abr.* 168; 11 *Ves.* 12. Why? Not on the ground of contract, for there is none giving A. a *lien*; but because it is the property of the debtor, pledged (though not to his creditor) for the debt. So it is with contribution. Our act of Assembly, which gives the right to one surety to call on the others, only reduced to statute law, what had long been the law of equity. The whole doctrine of principal and surety, with all its consequences of contribution, &c. rests upon the established principles of a Court of Equity. There is no express

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contract, between the sureties, for contribution. It results from the maxim, that equality is equity. Again; a surety will be entitled to every remedy which the creditor has against the principal debtor; to enforce every security, and all means of payment; to stand in the place of the creditor, even as to securities entered into, without the knowledge of the surety; having a right to have these securities transferred to him, though there was no such stipulation, and to avail himself of all those securities against the debtor. And the creditor can do nothing to invalidate or discharge the security he has taken from the principal debtor, to the prejudice of the rights of the surety; and if he has done such act, and disabled himself from transferring these securities to the surety, he will (unless in so doing he acted without knowledge of the other's rights, and with good faith, and just intention) be precluded from so much of his demand against the surety, as this latter might have procured, if the transfer could have been made; and all this, not upon the ground of contract, but upon a principle of natural justice; the same which regulates the doctrine of contribution among sureties. The creditor may resort to either for the whole, or to each for his proportion; and as he has that right, if he, from partiality to one surety, will not enforce it, the Court gives the same right to the other surety, and enables him to enforce it. For these principles, I refer generally to *Poth. on Oblig. No. 427, 496, 519, 520; 2 Vern. 608; 2 Ves. 622; 2 Madd. Ch. Rep. 437; 10 Ves. 412; 11 do. 22; 14 do. 162; 1 Johns. Ch. Rep. 412; 2 do. 554; 4 do. 130; 2 Bos. & Pull. 270.*

Let us apply these doctrines. If the creditor has a right to avail himself of any *lien* given by the debtor, to a surety, because it is the property of his debtor pledged to pay that debt; does not a surety stand upon quite as strong ground, when the common debtor has given to a co-surety a *lien* to secure him? If the surety is entitled to stand in the shoes of the creditor, and avail himself of securities given by the debtor to him, has he not the same right, the

same equity, where these securities have been given by the debtor to a co-surety? If equality be the rule, and the creditor shall not be permitted to throw the whole burthen on one surety; is it more consonant to natural justice, that the debtor should have this power—that he, for whom all the sureties have become bound, on the understanding of community of burthen and risque, and on the faith of the property he then held;—should have the power of selecting a favored co-surety, possibly (though the remark cannot apply to this case) the decoy-duck for the rest; and by a conveyance of the common fund, for his benefit, leave the others exposed to the payment of the debt, without a chance of indemnity? And, if it is not right, that the debtor should thus violate the law of equality, how shall we prevent it in a case like the present, where the property conveyed to two sureties, is sufficient to discharge the debts, for which the whole are bound? How, but by throwing the whole burthen upon that fund (the property of the common debtor,) which has been conveyed for the benefit of these favoured sureties? I see no other way. Suppose, in the cases before us, the creditor had levied his executions on the property of *Fawcett* and *Gambill*, and made the whole money out of them; would equity have permitted them to call on the co-sureties for contribution? No! because, they had in their own hands, property of the debtor, sufficient to indemnify them. This is most evident, both from the reason of the case, and from the authority of *M'Cormick's administrator v. Obannon's executor*, &c. 3 Munf. 484, where it is decided, that equity will not compel a surety to contribute, unless it appear that due diligence had been used, without effect, to obtain reimbursement from the principal debtor, or that he was insolvent. In one case, *Fawcett* and *Gambill*, without waiting to be compelled by an execution, have paid the whole. Does this change the equity of the case? Surely not. They have in their hands a full indemnity. But, I have dwelt longer, perhaps, on the subject, than I ought, without no-

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1824. ticing what I consider a direct authority of this Court, on
 June. the very point; I mean the case of *West v. Belches*, 5
 M'Mahon, Munf. 187. I cannot perceive the distinction taken between
 &co. that case and this. There, *Belches* and *Willis* were sure-
 v. ties for *Grymes*. To secure them, he gave them a *lien*
 Fawcett, on two negroes. *Belches* afterwards consented to cancel
 &co. this *lien*, and that *Grymes* should execute another, on all
 his personal estate, for the payment of certain debts, and
 among them, this one; for which *Willis* and *Belches* were
 sureties. *Grymes's* personal estate proved insufficient to
 pay the debts, and an execution was levied on the property
 of *Belches*. He filed his bill to stay proceedings, and for
 general relief. The Court say, "admitting that *Belches*
 consented, that upon the execution of the deed to *Hughes*
 and *Camp*, (the second deed of trust,) his own *lien* on the
 negroes should be released, he did not release, nor was he
 competent to release it, as it relates to *Willis*, who was
 no party to the transaction. As to *Willis*, therefore, the
 said deed is still in full force. The Court is of opinion, that
 even if *Willis* had been no party to the judgment sought to
 be enjoined, nor to the execution, it would be competent to
Belches, after paying off the same, to resort to him as
 a co-surety, for contribution of a moiety thereof; and,
 that for the purpose of preventing circuitry, and getting
 payment out of the proper fund, it would be also compe-
 tent to him, as standing in the place of *Willis*, to go for
 the said moiety against the negroes conveyed by the said
 deed. The Court is also further of opinion, that under
 that hypothesis, it would be competent for the appellee,
 (*Belches*), to stand in the place of *Willis*, and charge the
 said negroes for the whole sum. Nothing is more con-
 sonant to natural justice, than that the proper debts of
 every man should be paid out of his own estate, in case
 of innocent sureties, and that, that property of his in par-
 ticular, should be subjected, which has been bound thereto
 by a specific existing *lien*. These principles will avail the
 appellee, (*Belches*) supposing him to have released for him-
 self, his own proper *lien*, created by the first deed."

The principles here laid down by this Court, seem to me to be the very principles which I have been laboring to shew, from other sources, are the established doctrines of equity. And this is still more clear, from the reference, in the same opinion, to the case of *Eppes v. Randolph*, 2 Call, 125, where a surety, discharging the debt of a bond creditor, is put in his place, and given access to the land; the Court declaring, that the doctrine of substitution, established in that case, fully supported the decision in *West v. Belches*. The Chancellor seemed to think, that however the Court might give the co-sureties indemnity out of the trust fund, if the question were between them and the debtor alone, it could not do so, when the debtor had parted with his interest to subsequent incumbrancers, who were also innocent sureties. I cannot think that this makes a difference. So soon as *Ragan* executed the deed for the benefit of *Fawcett* and *Gambill*, the principles of equity attached, and the rights of the co-sureties accrued. Nor could any subsequent act of *Ragan's* detract from those rights, or affect the application of those principles. After the execution of the deed, nothing resided in *Ragan*, but an equity of redemption. He could convey no more to the subsequent incumbrancers; and they could only come in, upon the ground of redeeming all prior incumbrances to the full extent which these had, when their deed was executed. But, besides this reasoning, there is, in the same case of *West* and *Belches*, authority for this position. There, as well as here, was a second incumbrance, no way impeached; yet, it was not thought to limit or narrow at all the rights or equity of the co-surety. I conclude, therefore, that the deed of trust from *Ragan* to *Fawcett* and *Gambill*, rendered the land liable for the whole of the debts, in case of their co-sureties.

There are several other important points raised in this cause; such as: 1st. Was the sale under *Fawcett's* and *Gambill's* deed, authorised by it? 2d. Was it fairly conducted? 3d. Ought the compromise with *Richard Ra-*

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1824. *gan* to be set aside? These, I say, are important points; but, really, I cannot see how the plaintiffs are more interested in this discussion and decision, than any other person in the community. The land is wholly swallowed up by *liens* prior to theirs. Taking *Ragan's* tract as containing 900 acres, and the fair price as \$ 19 50, (which is considerably more than the evidence justified,) the value would be

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\$ 17,550 00

Or, say that the 63 acres, sold to *Gambill*,
was worth

\$ 1,873 00

And the 837 acres sold to *Fawcett* at \$ 19
50 per acre, making

\$ 17,331 00

And, in the aggregate, equal to

\$ 19,304 00

This is the utmost, and more in truth, than can be claimed. Now, take the debts for which this land is bound, and which must be paid before the official sureties can claim a cent.

Gambill's suretyships, \$ 1,873 00

Fawcett's ditto, paid and

bound for, 19,833 00

Fletcher bound for 4,504 00

\$ 26,210 00

Leaving a balance beyond the utmost value of the land, of

\$ 7,006 00

Suppose we throw in \$ 5,000 of this for errors in the debts of *Ragan*, for which the sureties are bound. This is a liberal allowance; still there will be upwards of \$ 2,000 attached upon this land, beyond its value, and claiming priority to the official sureties. What possible chance, then, can these plaintiffs have, of sharing in this fund? Even

supposing the land bound only for the proportions of *Fawcett* and *Gambill*, in those cases where there are co-sureties, still the amount of the prior liens is beyond its value; especially when we add the interest which three years of litigation, useless and wanton litigation, have added. I say litigation *useless* and *wanton*, in every point of view. *Useless*, because the plaintiffs had no interest in the subject matter. *Wanton*, because from the first, *Fawcett* and *Gambill* made offers, which ought not for a moment to have been rejected, unless the official sureties had abandoned all expectation of relief from the land. "Embark with us," (said *Fawcett* and *Gambill* to them,) "in the private suretyships by which we are bound, and we will give up to your management this whole fund, for the common benefit of all the sureties. Nay, more, I (said *Gambill*) will add \$100 to the stock; and I (said *Fawcett*,) will give you up my claims on *Ragan* for all I have paid, or may be compelled to pay as his public surety, if you will only release me from my private suretyships." Could better terms have been asked? Were they not more favorable than equity offers to a subsequent incumbrancer, seeking to get possession of the mortgaged subject? Must he not redeem the prior incumbrancers? Yet, this proposition was rejected. Again; after the sale of the 5th of April, 1821, and the dissatisfaction expressed by a few of the official sureties at that sale, *Fawcett* offered, either to set aside all that had been done, give up the fund to the official sureties, and take a deed of trust from them for his indemnity for the private debts; or, to let every thing stand, and he would convey to them the land he had bought, and take a deed from them, to indemnify him for the private debts unpaid. Could there be terms offered, more liberal than these? Yet, they were rejected. Again; at the argument in the Court below, propositions equally fair were renewed. The plaintiffs rejected them. Thus, from the origin, they seem to have been most obstinately determined to litigate the matter to the utmost extremity;

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1824, and, on this principle alone, can I account for their appeal
June. from a decree, in which all the errors that I can discover
 M'Mahon, are in their favor. As to the other questions, I deem it
 &c. only necessary to add, that I incline to think the trustee
 v. had power to sell; because, *Gambill* and *Fawcett*, being
 Fawcett, urged to speed by the strongest necessity, did nothing im-
 &c. proper, either in directing suits, or confessing judgments.
 The payments, though not in money, were a discharge of
 the debts, and so good against *Ragan*; and having been
 made under judgments, may be considered compulsory.

With respect to the sale itself, I cannot say that I ap-
 prove of the manner in which it was conducted. The re-
 quisition of specie within two hours, was certainly calcu-
 lated to discourage competition. Yet, when the question
 is, shall the sale be set aside? we must ask, was any sacri-
 fice produced by this unusual proceeding? It seems, that
 it prevented no person present, from bidding. All agree,
 that the land sold to *Gambill* went at its value; and,
 though, that to *Fawcett* was nominally sold low, yet it
 was charged with the prior liens to *Gray*; and, these, toge-
 ther with the debts *Fawcett* is bound for, and which are
liens on the land, will amount to more than its value; ta-
 king the highest estimate, and charging *Fawcett* with all
 that part, which, under the compromise with *Richard*
Ragan, he conveyed to him. As to that compromise, I
 think with the Chancellor that it is advantageous to all
 parties, and ought not to be disturbed. This (*it was ob-*
jected in the argument) was trying a writ of right in a
 Court of Equity. I do not think so exactly. I agree that
 Courts of Equity have no direct jurisdiction over legal ti-
 tles; and, where the case depends on a simple legal title,
 and is brought up directly by the bill, I should consider
 such a bill demurrable. But, equity does sometimes de-
 cide on the legal title, when it arises incidentally. 2 *Johns.*
Ch. Rep. 519. It arose in that way here, and was brought
 up too, by the very persons who now object to the juris-
 diction.

I have touched these questions so briefly, because (as I said) I cannot conceive the plaintiffs interested in their decision. Why should they seek to disturb the sale of the land, when under no circumstances can they profit by it? This is so evident, that *Fletcher*, a prior incumbrancer, states in his answer, that his prospect for indemnity was very small, and even *that* would be blasted, if this litigation should proceed. Nay, of the official sureties themselves, (17 in number) ten are well satisfied with the sale; and it will be recollected, that by the terms of the deed, a majority of them have a governing power in proceedings under it. These ten are made defendants. They state that they wish the sale to stand, and the only questions they make are, whether the co-sureties are protected by the deed to *Fawcett* and *Gambill*, and whether the provisions of that deed extend to debts not specially named. The first point I have discussed. The second was very properly given up by the counsel for the appellants in the argument. In the supplemental bill, it is charged that *Fawcett*, as collector of the United States, recovered several judgments, and put the executions into *Ragan's* hands, during the time that the plaintiffs were sureties: that *Ragan* paid *Fawcett* monies to be applied to these executions, which *Fawcett* applied to private claims he had against *Ragan*, and then recovered the amount of the executions against the official sureties, who were ignorant that such payments had been made. *Fawcett*, in his answer, asserts, that the subject of these allegations was well known to the plaintiffs, and much discussed, prior to the judgments at law: that the plaintiffs might have defended themselves there: that the accounts between himself and *Ragan* had been properly settled and ought not to be disturbed. The Chancellor has sent this part of the cause to a commissioner. But, it seems to me, that this new allegation is so wholly distinct from, and unconnected with the topics of the original bill, as not properly to constitute matter for a supplemental bill; and, if it did, I ra-

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aid of a commissioner.

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There is another point, on which I am compelled to differ with the Court below; that is, the order that each party pay his own costs. The plaintiffs, without any just ground, and in the teeth of the fairest propositions, have brought this suit; which, though it can do them no good, has probably injured, most essentially, some of the defendants. They have stuffed the record with innumerable depositions; forced the other party, in self-defence, to incur great expense; and, in my opinion, ought to pay all costs.

I am of opinion, that the decree be reversed: that the plaintiffs pay the costs of the Court below, as well as here; and that the bill be dismissed without prejudice to any suit, which the plaintiffs may be advised to bring, on the subject of the supplemental bill, relative to the collectorship, and the accounts growing out of those transactions.

Decree reversed, and bill dismissed.

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The copy of a deed may be read in evidence, upon the oath of a party, that he had searched the Clerk's office and all other places where he supposed the original deed might probably be found, and had not been able to find the original.

A certified copy of a deed recorded upon the acknowledgment of the grantor, not required by law to be recorded, is evidence against the grantor, and all claiming under him, *subsequently to the acknowledgment*. But it is not evidence against any person, deriving title from the grantor, *before the acknowledgment*.

This was an appeal from the Superior Court of Law for Mecklenburg county.

Ben and twenty-three others, persons of colour held in slavery, brought a suit against *Edwin H. Peete*, to recover their freedom. The usual issue was joined, and the jury found a verdict for the defendant. At the trial, two bills of exceptions were filed. 1. The plaintiffs excepted, because, after they had introduced a deed of emancipation to the female ancestor of the plaintiffs, from *Howell Pennington*, her former master, dated the 25th of June, 1795, the defendant offered in evidence an office copy of a deed from the said *Pennington* to *Martha Pennington*, conveying the same negro girl, (the ancestor of the plaintiffs) for valuable consideration, dated the 20th of November, 1774. To this deed is annexed a certificate from the Clerk of Mecklenburg county, that on the 18th day of May, 1812, the bill of sale (as it is termed) and the receipt thereon endorsed, to *Martha Pennington*, was *acknowledged by Howell Pennington*, and ordered to be recorded. To the introduction of this copy the plaintiffs objected, on two grounds; 1st. That it was not competent for the defendant, as the administrator of *Howell Pennington*, to shew, that at the time the deed of emancipation aforesaid was executed, the title to the said slave *Betty* was not in the said *Howell Pennington*; and, 2dly. Because the said copy could not be read, unless the defendant could prove that the original was lost: that the *defendant* swore in

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open Court, that he had examined the Clerk's office of Mecklenburg, and all other places where he supposed it probable that the said original deed could be found, but he had not been able to find it: that the defendant proved by the Clerk of Mecklenburg County Court, that he had examined his office for the said original deed, and had not been able to find it. But the Court permitted the said copy to be read as evidence to the jury, and the plaintiffs excepted.

The second bill of exceptions stated, that the defendant offered in evidence the same bill of sale; and the plaintiffs moved the Court to instruct the jury, that unless the defendants, under the act of 1758, proved the recording of the said paper within eight months, no title passed thereby. [N. B. The bill of sale is dated the 20th of November, 1774, and it was ordered to be recorded on the 18th of May, 1812.] But the Court refused to give the instruction, and the plaintiffs excepted, and appealed to this Court.

Gilmer, for the appellants.

Leigh, for the appellee.

June 12. Judge CARR, delivered his opinion.

The sole question put in issue by the pleadings, is the freedom of the plaintiffs. If they can establish, by legal evidence, their title to freedom, they must succeed. If they be slaves (no matter to whom,) they must fail. To prove their right, they rely on a deed of emancipation, executed by *Pennington*, their former master, dated the 25th of June, 1796. To defeat this evidence, the defendant produces an *office copy* of a deed executed by the same *Pennington*, and dated the 20th of November, 1774, purporting to sell to *Martha Pennington*, on certain terms and conditions, the slave *Betty*, &c. from whom it was agreed that the plaintiffs are descendants. To the admissibility of this copy, the plaintiffs objected on two grounds, only

one of which is worthy of consideration; that is, because the copy could not be read, unless the loss of the original was established. To remove this objection, the defendant made oath that he had searched the Clerk's office, and all other places where he supposed the original deed might probably be found, and had not been able to find it. The Court over-ruled the objection, and permitted the copy to go to the jury. *Was this correct? The general rule is, that the best evidence must be given, of which the nature of the thing is capable. The deed here is the best evidence. But, it is said to be lost. If so, the law is not so unreasonable as to require its production, but is satisfied with the next best evidence, a copy. To lay a ground, however, for the introduction of this secondary evidence, it must be shewn with reasonable certainty, that the original is lost. Were the Court correct in receiving the defendant in this case, to furnish by his own oath, evidence of the loss of the original; and if so, was the evidence sufficient to let in the copy?

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As to the first, I was strongly inclined to think, when I commenced the examination of this subject, that the defendant ought not to have been suffered to give evidence. It seemed to me to innovate seriously upon that fundamental rule, that no body shall testify in his own cause; and the innovation, I feared, would endanger the purity of evidence. Further examination has shewn me, that the practice is against my first impressions; and though I do not cite the following cases as binding authority, I am disposed to yield to their weight. I had not adverted to the well settled distinction between evidence offered to the Court, upon a collateral point, not for the consideration of the jury, and evidence in chief. In the latter case, no interested witness can be heard. In the former, the parties themselves are often examined *by the Court*. *Forbes v. Wate*, 1 *Black. Rep.* 532. The issue was *non est factum* in a suit on a bond. It became necessary to prove, that the subscribing witnesses were dead; and the plaintiff him-

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self was examined as a witness to that point, and as preparatory to the proof of the hand-writing. In *Jordan v. Cooper, Sergeant and Rawle's Rep.* 504, the question was, whether the Court below had done right in admitting a party to prove by his own oath, notice to the other party to produce a certain deed. Chief Justice TILGHMAN, considered it the settled practice, in collateral matters of this kind, to admit the evidence of the party. He cites several cases from *Yates*, to the same point. See also *Douglas's lessee v. Saunderson*, 2 Dall. 116, citing 1 *Black. Rep.* 532; *Godb.* 193, 326. In *Butler v. Warren*, 11 *Johns. Rep.* 57, the Court considered the admission of an interested witness, to prove service of a notice on the defendant to produce a paper on the trial, preparatory to giving evidence of the contents of the paper, as an infraction of the rule of law, which precludes the admission of an interested witness to give evidence on the trial. But in *Jackson, &c. v. Frier*, 16 *Johnson's Rep.* 193, the subject is again considered. Chief Justice SPENCER, delivers the opinion of the Court, and in a clear and sensible manner, states the reasoning on the subject, cites all the authorities, overrules the decision in *Butler v. Warren*; and decides that a party may be examined by the Court, to lay a ground for the introduction to the jury of secondary evidence. The evidence of the loss of a deed (he says) is addressed to the Court alone, and it is not a subject on which the jury are to pass. See also *Givens, &c. v. Manns*, 6 *Munf.* 201, where the Court say that a party, by affidavit, may prove the loss of a bill of sale. I conclude that the Court, in admitting the defendant to give evidence as to this collateral matter, did not err.

Was the evidence of loss sufficient to let in the copy? The defendant swore, that he had searched the office, and every other place where the deed would probably be, and had not been able to find it. He also proved by the Clerk of the Court, where it had been recorded, that he had examined his office and could not find it. I think this was

sufficient to let in the secondary evidence; for, the "law exacts nothing unreasonable in such a case. If the parol proof of loss establishes the fact with reasonable certainty, it is sufficient." 8 *East*, 289; 10 *Johns. Rep.* 374; 16 *Johns. Rep.* 193.

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We must next enquire, whether the secondary evidence offered in this case, was sufficient? It is an office-copy, without other proof of the execution of the original deed, than its being recorded upon the acknowledgment of the grantor. If this were a deed, required by law to be recorded, there would be no difficulty in the question; copies of such deeds being every day admitted, without other evidence, than their having been recorded. But, from the best examination I have been able to give the subject, I cannot find any act of Assembly, directing that a bill of sale of slaves, whether taking effect *in presenti* or *in futuro*, shall be recorded. The act of 1758 does not touch the subject, as it relates to deeds of *gift* of slaves; and this is a deed of bargain and sale. The statute of frauds and perjuries does not apply, because it speaks of deeds on consideration *not deemed valuable in law*; this is a deed for *valuable consideration*. The act for regulating conveyances, in the 4th section, speaks of *settlements*; and this may be called a *settlement*; but, certainly it is not a *marriage settlement*, of which alone that section speaks. The question is, therefore, free from the influence of our recording laws. In *Lee v. Tapscott*, 2 Wash. 281, and *Rowletts v. Daniel*, 4 Munf. 473, it is said, that the copy of an ancient deed, *where possession has followed the deed*, and, (in the latter case,) where the deed was recorded on the acknowledgment of the grantor, shall be received, without any proof, that the original is lost or destroyed. I do not consider these cases as in point; for, though ours is an ancient deed, it wants that corroboration arising from possession. In *Stip v. Turner*, 1 Wash. 222, a deed had been admitted to record, on the certificate of two persons, styling themselves Justices of the Peace

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for South Carolina; but, the Governor's testimonial was wanting. On a trial in ejectment, the plaintiff relied on this deed, and produced a witness to prove the execution of it. The Court below rejected the witness and the deed. This Court said, the deed was neither legally proved, nor legally recorded; and, *as a recorded deed*, would have been properly rejected; but, that such deeds were valid between the parties; that the actual execution of the deed, was a fact which the plaintiff was at liberty to prove, as in other cases, by evidence satisfactory to the jury.

Applying this law, it would seem, that if *the party be* at liberty to prove the actual execution of the deed, as he does other facts, the acknowledgment of the grantor in a Court of record, might be considered pretty strong evidence of such execution. The case of *Maxwell v. Light*, 1 Call, 117, may also be considered as having some bearing on the present; the Court deciding there, that if the deed of lease was admitted to record *at the instance of the appellant*, a copy might, under the circumstances, be received as evidence. The English books give us much more light upon this subject. *Gilbert*, in his *Law of Evidence*, 86, says, that where a deed *needs* enrolment (as deeds of bargain and sale by 27th *H.* 8, ch. 16,) there the enrolment is the sign of the lawful execution of such deed, and a *copy* shall be a sufficient attestation; but, where a deed needs no enrolment, the *inspeximus* of such enrolment is not evidence. Buller, in his *Nisi Prius*, commenting on this passage, doubts whether deeds of bargain and sale enrolled, ought to be given in evidence without being proved; though, he admits that such was the practice at *Nisi Prius*. He adds "the case of *Smartle v. Williams*, is much relied on in support of this practice; but, that case is wrong reported; for, it appears from the report in 3 *Lev.* 347, that the acknowledgment was by the bargainor, and so is stated in *Salkeld's* manuscript. Besides, it appears from both the books, that it was only a term that passed, and, consequently, it

was not an enrolment within the statute." After some further remarks to shew that the bare enrolment ought not, in all cases, to make the deed evidence, Justice BULLER adds, "on the other hand it seems as absurd to say, that a release which has been enrolled, upon the acknowledgment of the re-leasor, shall not be admitted in evidence against him, without being proved to be executed, because such release does not need enrolment; and, in fact, such deeds have often been admitted, and that was the case of *Smartle v. Williams*. The deed there, did not need enrolment, yet being enrolled, on the acknowledgment of the bargainor, it was read against him without being proved." In 1 *Salk*. 280, is the case of *Smartle v. Williams*, referred to by *Buller*. "A deed of bargain and sale, acknowledged by the bargainor and enrolled, (by which a term for years was assigned) was given in evidence, without any proof of the bargainor's sealing and delivery thereof; and, after debate, it was allowed by C. J. HOLT, EYRE and *tot. cur.*; for, the acknowledgment of a party in a Court of record, or before a master extraordinary in the country (as this case was) is good evidence of its being sealed and delivered; and, such an acknowledgment *estops* a man from pleading *non est factum*." In *Lady Halcroft v. Smith, Freem.* 259, a distinction was made between deeds of bargain and sale (enrolled under stat. H. 8,) and other deeds enrolled; and, it was held that a copy of a deed enrolled for safe custody, would not be evidence, otherwise than against the party who sealed it, and all claiming under him. *Phillips*, 410, after citing the cases, concludes thus: "The rule concerning copies of enrolments appears then to be, that a copy of the enrolment of a bargain and sale of freehold in lands, &c. is as good evidence as the original itself; but, that a copy of the enrolment is not evidence of a bargain and sale of a chattel interest, or of the contents of any other deed enrolled for safe custody, except as *against* the party acknowledging the deed; and, that against such party, and against all claiming under him,

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a copy of the enrolment of any deed is admissible in evidence." From these authorities, I think it may be safely concluded, as a general proposition, that the office copy of a deed recorded on the acknowledgment of the bargainor, (though there be no law requiring such record) is admissible evidence against the bargainor, and those claiming under him. This, I say, may be admitted as a *general proposition*; but, it still remains to enquire, whether the particular circumstances of the case before us, do not take it out of the rule.

The deed of bargain and sale was executed in 1774. In whose possession it remained afterwards, we are not informed; nor does the record give us any information, whether the defendant who produced it is in any way connected with it, or claims under it at all; or whether any other persons set up claims under it. It is produced merely to shew, that at the time the deed of emancipation was executed, the grantor had no title. That deed, (under which the plaintiffs claim their freedom) was executed in June, 1796, and duly recorded in the August following. The deed of 1774, is recorded, on the acknowledgment of the grantor, in 1812, thirty-eight years after its execution, and sixteen years after the execution of the deed of emancipation. And the question is, must this acknowledgment be taken as proof of the execution of the deed, against the plaintiffs? I strongly incline to think not. It is clear, that after the execution of the deed of emancipation, the grantor could not, by any act or deed of his, revoke that deed, or divest the title to freedom, which it had vested in the plaintiffs; and yet, nothing will be easier than to effect this indirectly, if his subsequent acknowledgments are admissible against the plaintiffs. Suppose the grantor, after emancipating his slaves, to change his mind, and repent of the act. He has only to execute to a purchaser a bill of sale for them, take no witnesses to the transaction, give the bill of sale a date prior to the deed of emancipation, and have it recorded on his acknowledgment. In the case

before us, there is not a tittle of evidence of the existence or execution of the deed, but the acknowledgment of the grantor, made 16 years after the execution of the deed of emancipation; and, although the rule of law be, that that acknowledgment is to be taken as evidence against him, and those claiming under him, I believe we must limit the meaning to those claiming under him, by title derived *subsequently* to the acknowledgment. This may be illustrated by analogy. It is laid down in the books, that the recital of a deed in another deed is evidence against the party who executed the reciting deed, or against any person claiming under him. 1 *Phill. Evid.* 411; yet, when this rule comes to be applied, it is restricted to those claiming under the grantor, by title subsequent to the deed. In *Penrose v. Griffith*, 4 Binney, 230, this point came directly before the *Supreme Court* of Pennsylvania. C. J. TILGEMAN said: "The rule of law is, that a deed containing a recital of another deed, is evidence of the recited deed, against the grantor, and all persons claiming by title derived from him *subsequently*. What is the reason of this rule? It is this: the recital amounts to a confession of the party; and that confession is evidence against himself, and those who stand in his place. But, such confession can be no evidence against a stranger; it can be no evidence against one, who claims by title derived from the person making the confession, *before* the confession made; because he does not stand in the place of the person making the confession; he claims paramount the confession. One who has conveyed his right, can, by no subsequent confession, affect the right which he has conveyed." The rule thus laid down, is admitted by the rest of the Court. In the same book, *Garwood v. Dennis*, p. 327, the rule is again stated with the same restriction. In 2 *Bay's Rep.* 93, it is decided, that the obligee of a bond is an incompetent witness to prove payment, so as to destroy the right of the assignee to recover. In *Frear v. Evertson*, 20 Johns. Rep. 142, the question was, whether

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the admissions of a party *after* he had assigned his interest to another, could be given in evidence. The Court say, "that, having assigned his interest in the *chase in action*, he could not impair that interest by any confessions made by him, to the prejudice of his assignee." The same principle may be found in several of our own Reports. In *Vaughan's adm'r. v. Winkle's ex'r.*, 4 Munf. 136, in trespass for goods taken away, proof by witnesses that the person of whom the plaintiff bought the goods, was heard to say, before the institution of the suit, that *when* he sold them they belonged to the defendant, was decided to be inadmissible. In *Givens, &c. v. Mann*, 6 Munf. 191, a suit for freedom, the plaintiffs claimed under a deed of emancipation from *Thomas Reynolds*; the defendants were purchasers of the paupers, as slaves, from *John Reynolds*, the son of *Thomas*. The Court decided, that the admissions of *Thomas*, with respect to *John's* title and possession, so far as they were made *prior* to the deed of emancipation, might be received; but that no *subsequent* acknowledgments were admissible. These authorities well warrant the conclusion, I think, that in the case before us, the acknowledgment of *Pennington*, of the execution of the deed, is no evidence of that fact, as against the plaintiffs; and, consequently, that the copy of the deed, resting solely on that acknowledgment, ought not to have been admitted by the Court below.

I am of opinion, therefore, that the judgment be reversed, and the cause sent back, with directions to the Court, not to receive the copy, unless the execution of the deed be proved by sufficient evidence, exclusive of the acknowledgment of the grantor.

The other Judges concurred; and the judgment was reversed, and the cause remanded.*

* Judge GREEN, absent.

URQUHART and others v. CLARKE and others.

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What uncertainty in the description of the subject, in ejectment, will be tolerated?

Where a husband conveys the property of his wife, with warranty against the claims of *himself* and *his* heirs, his children, deriving title from their *mother*, will not be affected by the warranty.

The doctrine of collateral warranty examined.

This was an appeal from the Superior Court of Law of Orange county.

It was an action of ejectment brought by the appellants against the appellees, for a tract of land in the county of Madison, in which judgment was given, upon a special finding of the jury, in favor of the defendants. The following opinion presents a full statement of the facts.

Johnson, for the appellants.

Wickham, for the appellees.

June 11. Judge COALTER, delivered his opinion.

The verdict in this case, which finds for the plaintiff the lands in the declaration mentioned, subject to the opinion of the Court on two points submitted by the jury, states that Dr. *William Lynn* was seised of the lands in controversy at the time of his death, and made his will, which they find, and set out at large, in their verdict. In this will is the following clause: "I give to my daughter *Ann Dent*, during her natural life, the use of my dwelling-house and kitchen, lot and garden, with their appurtenances" (this, I understand, was his house in Fredericksburg, and is no part of the premises in controversy,) "also my home plantation in Culpeper county, which I bought of *William Eddings*, containing 599 acres; also a tract of land thereto adjoining, which I bought of Mr. *Alexander Waugh*, containing 230 acres; also the following slaves," (naming a number of slaves and other personal property)

1824. "to hold the said houses, lot, garden, lands, slaves and
 June. personal estate, to my said daughter *Ann Dent*, during her
 Urquhart, natural life, and after her death to be equally divided
 &c. among the children of my said daughter *Ann Dent*, and
 v. their heirs or assigns; but if she should die without issue,
 Clarke, &c. then I give the same to be equally divided among the chil-
 dren of my reputed daughter Mrs. *Hannah M'Cauley*,
 of her lawfully begotten, and their heirs and assigns for-
 ever."

The jury, as I have before stated, find for the plaintiff, if, under the will of Dr. *William Lynn*, found by them as aforesaid, and in the event of the death of *Ann Dent*, without ever having had any child or children, which happened before the institution of this suit, the heirs of *Mary Duncanson* (who are the lessors of the plaintiff) who was born before the making of the said will, and who died in the life-time of *Hannah M'Cauley* and *Ann Dent*, in the said will mentioned, (and who was the only and legitimate child of *Hannah M'Cauley*, who died without ever having had any other child or children, and before the institution of this suit) are entitled to the lands in question; and if the Court shall also be of opinion, that there being devised by *James Duncanson* to the lessors of the plaintiff, children and heirs of the said *James Duncanson* and *Mary* his wife, lands of more value than the lands in question; and the said *James Duncanson* having warranted the lands in question, by deed in the following words, (which is set out at large) does not destroy the right of the lessors of the plaintiff, to recover.

The will bears date in February, 1758, and is recorded in March of the same year.

The deed found as aforesaid, bears date on the 13th of October, 1780, and purports to be a deed between *James Duncanson* and *Mary* his wife, of the one part, and *Thomas Porter* of the other; and that, for the consideration of £1,200 current money of Virginia, to them paid, &c. they had bargained, sold, &c. to the said *Porter*, his heirs and

assigns, that tract or parcel of land, lying in Culpeper county, whereon *James Finney* formerly lived, containing 600 acres more or less, bounded, &c. with the appurtenances, &c. "with all rents and reversions of rents, and *all the estate, title, interest, profit, claim and demand whatever them the said James Duncanson or Mary his wife, in and to the premises aforesaid, and every part and parcel thereof*; to have and to hold the said premises and appurtenances to the said *Thomas Porter*, his heirs and assigns forever, to his and their own proper use and behoof." And "the said *James Duncanson and Mary his wife, for themselves, their heirs, executors, and administrators, doth covenant and grant to and with the said Thomas Porter*, his heirs and assigns, that the said *Thomas Porter* shall and may, at all times hereafter, peaceably and quietly have and hold and enjoy, the hereby conveyed land and premises and every part thereof, without the lawful claim or interruption of *him the said James Duncanson or his heirs, or any other person* claiming from, by, or under *him, or any of them*; and that the said *James Duncanson and his heirs*, the said land and premises and every part thereof, unto the said *Thomas*, his heirs and assigns, shall and will warrant and forever defend, against him the said *James Duncanson and his heirs, and against all and every person whatsoever*, claiming by, from, or under him or any of them."

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This deed purports to be signed and sealed by *James Duncanson and Mary Duncanson*. There are no witnesses to it; but on the 16th of October, 1780, (three days after its date) it was acknowledged in Culpeper County Court by *James Duncanson*, and ordered to be recorded.

The questions then intended to be submitted by the jury were, first, whether the limitation over to Mrs. *Duncanson*, in the events which happened, were good? Secondly, whether the warranty in the deed bars the lessors of the plaintiff?

1824. We are, however, told, that as various other tracts of
June. land were devised by the will aforesaid, it does not suffi-
 ~~~~~  
 Urquhart, ciently appear that the tract of land in controversy is that  
 &co. tract, or any part of it, which is devised by the clause  
 v.  
 Clarke, &co. above cited.

The tract of land claimed in the declaration, is five mes-  
 suages and five hundred acres, in Madison county.

I suppose the Court can judicially know, that in Decem-  
 ber, 1792, Madison county was taken from Culpeper; so  
 that these lands, formerly in Culpeper, might thereafter lie  
 in Madison. 13 *Hen. Stat.* 558.

It appears to me, that the events which the jury find as  
 having taken place, could not have been important, in re-  
 lation to any other lands devised by the will, except those  
 mentioned in the clause above cited, though several tracts,  
 lying in Culpeper, were devised.

As this is not a special verdict, but one merely submit-  
 ting certain points for the opinion of the Court, evidently  
 growing out of the clause first above cited; and as this is  
 moreover an action of ejectment, which, if any mistake  
 has occurred, will not bind the rights of the parties, but can  
 be put right on the trial of a new ejectment, I think it  
 would be improper to direct a new trial, on account of this  
 supposed imperfection in the present verdict.

Taking the land in controversy, then, to be that devised  
 by the clause above quoted, I think, in the events that  
 have happened, the limitation over is good, as a remain-  
 der in fee to Mrs. *Duncanson*, and that the lessors of the  
 plaintiff are entitled to the land, unless they are barred by  
 the warranty of their ancestor, under the circumstances  
 found by the jury. This seems to me to be the only and  
 great question in the cause. It is one, concerning which  
 I have had great doubt and difficulty; insomuch, that I am  
 happy that this is a case of ejectment, in which, as I under-  
 stand, one trial, even in a case where this Court shall pro-  
 nounce its opinion, is not *absolutely final and conclusive*  
 of the rights of the parties.

We come now to the deed; and one important enquiry will be, taking the whole deed together, what was the object and intention of the parties, by the clause of warranty contained in it. In other words, against whom did the warrantor intend to warrant?

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He did not intend a general warranty against all the world. On the other hand, I suppose it will readily be conceded, that he intended at least to warrant, that neither he himself, nor any person claiming under him, either by purchase or descent from him, should claim; nor should any claim under such person, so claiming under him. This would be the *literal*, but is it the *fair and full construction* of the deed, taking all the parts of it together?

To carry it further, we must decide one of three things: 1st. He intended to warrant that neither he, nor his wife, nor any person under them, should claim; or, 2dly. He intended to warrant against the claim of any one, who, at that time, shall prove to be his heir, although he does not claim the land by purchase or descent from him, but by purchase or descent from some one else, and that no one shall claim, either by purchase or descent, under such person; 3dly. Or, it was his intention to warrant that neither, nor any *child of his by his wife*, nor any person claiming under them or such child, should claim.

Taking it for granted, that his intention was to sell, not merely his own contingent interest in this land, but that of his wife also, and those interests *only*, he then did not intend to warrant, 1st. That Mrs. *Dent* would not have a child, whereby the whole estate might be defeated; nor, 2dly. That Mrs. *McCauley* would have no more children, whereby it might be defeated in part. But, 3dly. Did he mean to warrant, that in the event that his wife should not unite with him and execute the deed, so as to pass her interest, and should survive him, she should not claim?

If this was his intention, it is strange that neither the clause for quiet enjoyment, nor the clause of warranty, say any thing as to her claim. It either was believed that

1824. she would convey, or it was known or believed that she would not. If the former, then it was only necessary to warrant against her, in order to guard against the accident of her death, before she executed the deed. But the grantor might say, "I will not subject myself to this risque and its consequences. The intention is, that both shall convey, but I will not warrant against her; you must see that both convey, or vacate the contract." Or, if it was believed that she would not convey, the grantor might say, "I will not warrant against her, but only against myself and my heirs." That some considerable *risque* was contemplated by the parties, may perhaps be inferred from the small consideration stated in the deed; the sum, at the then state of depreciation, being very small.

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But, be this as it may, either in consequence of some omission in the deed, or for some reason operating on the parties, there is no clause of warranty against her. And it seems to be admitted, 4th. That in the event that Mrs. *Duncanson* did not unite in the deed, so as to pass her interest, and in the further events that she should survive *Duncanson*, and have children by another husband, it was not intended to warrant that such husband should not claim *courtesy*, or, that those children should not claim all the land, if his children by her were dead, or a part, if they were not. Nor, 5th. Did he intend to warrant, that in the event of her not uniting in the conveyance, and in the further event that she should leave no child by any husband, that her collateral heirs should not claim.

If he intended to warrant against all those mentioned in the 3rd, 4th and 5th cases above put, the deed ought to have contained, or must now be construed as meaning a general warranty against himself and his wife, and all the world, who might claim by, through, or under them, or either of them.

I had great doubts, at first, whether the deed ought not to be so construed. As the object seems to have been to sell the interest of himself and his wife in the land, it would

seem reasonable that the purchaser should be secured against all persons claiming under them or either of them. But, if I am correct in the conclusion I have come to above, that it was not intended to warrant against the claim of the wife herself, in case she should not unite in the deed, but survive the husband, the same course of argument would seem to repel the construction, that it was intended to warrant against all persons claiming under her. I now think, that I should not be justified in putting so broad a construction on the deed, as I at first supposed.

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But, it may be said, that if the wife, or any person claiming under her, proved, at the time of such claim, to be the next of kin and heir to the husband, it was intended to warrant against such person. As to such claim by the wife; let us suppose that Mrs. *Duncanson* herself had survived her husband, and, being next of kin, was his heir at law; would she be barred from claiming her own fee simple land, aliened by him during the coverture? If they had been lands, to which even her title was complete, and reduced to possession, so as to entitle her husband to courtesy in case of survivorship, I apprehend this collateral warranty would not bind her. If it would, it would bind her without assets; for, the statute of *Gloucester* does not extend to her. *Co. Litt.* 379, *b*, 381, *a*; 2 *In.* 292, 293, 294. In fact, she never was considered within the mischief of the statute, which extends only to her heirs, not to herself. Her fee simple interest, it would appear to me, would at least be as secure to her, as her dower interest, which cannot be divested of its original essence, and which is, therefore, not barred by a collateral warranty of the ancestor of the dowress. *Co. Litt.* 389, *a*; 10 *Co.* 986. But, for another and conclusive reason, it appears to me, she would not be barred. She never could sue for the land during the life-time of the husband, and therefore no breach of the warranty, arising from the claim of the wife, could take place in his life-time; so that he would never be bound in his life by a warranty against

1824. her. In fact, it would be a warranty binding only on her  
*June.* as his heir, after his death, and not on him. But, it is a  
 Urquhart, maxim in law, that such a warranty as never binds the an-  
 &co. cestor, cannot bind the heir. *Co. Litt. 386, a.*  
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But, if it cannot be so construed as to the wife, it may be said that if any of the persons mentioned in the fourth and fifth cases above put, proved to be the next of kin and heirs of the grantor when they claimed, it was the intention to warrant against them, in the event that they should happen to be his heirs; although, they did not claim the land under him, and although he did not intend to warrant against the very same claim, provided it was made by one not his heir.

This would appear to me, not only to be a refinement and subtilty of construction which the deed will not warrant; but, that the following consequences, fatal to the alleged bar in this case, would be the result. Thus, the husband conveys with special warranty, as in this case, and the wife dies, and her heirs, either lineal or collateral, claim the land during the life of the husband; there is no warranty against them, as her heirs, or persons claiming under her generally; and, so this would be no breach of warranty by the husband. They are not his heirs, for no one is heir to a person alive; and, as he is now supposed to warrant only against persons, who, at the time they claim, prove to be his heirs, the warranty cannot bind him during his life, and, consequently, never can bind his heirs, according to the maxim above stated.

A warranty of this *special kind* by tenant by the courtesy, I apprehend never could bar his heirs. To bind them, it must also bind him, and, consequently, if it is not a general warranty against all the world, so as to be binding on him whenever a claim is made, or at least such warranty as I, at one time, was disposed to think this was, to wit: against himself and his wife and all persons claiming under them or either of them, it seems to me that it could not bind or bar his heirs. So, that if the construc-

tion could be maintained, that this was a warranty against every one, as well children by her, as every one else, who might prove, at the time of claim, to be his heir, it appears to me that the construction would not aid the appellees.

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But it may be said, (and indeed, as I understand it, that is the construction mainly contended for in the argument,) that he intended to warrant against any claim by his children by her, or any person under them; so as to make it like a warranty against J. S. his heirs and assigns. Had the clause of warranty been expressly to this effect, or if it can be so construed, then he might have been bound thereby in his life-time, because any claim by such person, in his life-time, would have been a breach of the warranty by him, and he could have been vouched, &c.; and consequently, such claimant after him, having assets by descent of equal value, would be barred, unless some other objection taken, would avail. But can we do so great a violence to the deed as to change the word *heirs* into the words *children by her*? As her interest, as well as his, in the land, seems to have been the subject of the sale, it seems to me more reasonable to extend the warranty to mean *all persons who might prove to be his heirs*, than to limit it to *his children by her*, who of course would be his heirs. In short, it was probably intended by the parties, that she should unite in the conveyance, and in that case all persons claiming under her would be barred, so as to render any warranty as to them, unnecessary; but as that did not take place, I do not see that for that reason, we can now do so great a violence to the deed. On the other hand, if it was not expected that she would join in the deed, though it purports to be made and sealed by her, it is strange that a warranty against her and her heirs, if such was intended, should be entirely omitted; or, if it was intended to warrant against himself and *her children by him only*, that the deed should not have so expressed it. If these were the views of the parties, then it was intended to bar those children, *not by her deed*, but by the collateral warranty



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of their father. It can hardly be presumed that this doctrine of collateral warranty was either contemplated or understood by the parties; and if contemplated, was certainly not understood, or different words would have been used.

Suppose she had survived, and had sold *for value*, or made a deed of gift of these lands to her children, as she might have done to a stranger who might have sold or given it to them; would her power, she having the complete title in her, to aliene to them, be in effect defeated by this warranty, so that they could not claim under such deed? If her name had not been in this deed, so that it clearly appeared that she was not expected to join in it, and the object was, to warrant only against *himself and his children by her*, he would have covenanted and bound himself and his heirs, that neither *he nor his children by her*, nor any person under them or any of them, should claim. This is the construction now under consideration; and can the deed be so construed? I should doubt this extremely, even if the deed had not purported to be executed by her.

Again: Without an entire change of words as aforesaid, a covenant by A. binding himself and his heirs, to warrant against himself and his heirs, cannot be likened to a deed to warrant against J. S. and his heirs; because, in this latter case, if J. S. or his heirs claim, as they may, in the life-time of A. then he will be barred by the warranty; but, in the other, none can claim who can be called his heirs, in his life-time; and consequently the warranty can only be broken by his heirs, whether they claim under him or not, after his death. So that he could never be bound or prejudiced by such warranty.

Being met by these difficulties on all sides, what can we say more, than that the parties may have intended something else than the literal interpretation of the deed will lead us to? But, what that interpretation is, it is impossible for us, from the case now before us, to discover; and that, therefore, as the letter of the deed contains no war-

warranty against her, or her heirs, though they may be his heirs also, it presents no bar to the recovery. 1824.  
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This view of the case relieves one from the necessity of a minute enquiry into other important points in this case, concerning some of which, it might possibly be necessary to have a new trial, in order to ascertain certain facts, not found in this verdict. Urquhart,  
&c.  
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As I understand the doctrine of collateral warranty, at present, it was binding on the heir on whom it descended, on the legal presumption that the ancestor would not disinherit his heir, without making him compensation; and this the rather, because, if the heir had doubts about this, he could enter at once, and avoid the warranty. But, if he did not do this, in the life-time of the person aliening, he was estopped afterwards from doing it. But, then, in order thus to bar him, the estate must be displaced, or put to a right, before or at the time of the warranty made. For, he who is in possession, need not put in his claim to avoid the collateral warranty. *Co. Litt.* 366, *a*; *Ib.* 373, *b*, *n.* 2; *Ib.* 367, *b*, *n.* 1; 10 *Co.* 97, *a*; *Co. Litt.* 388, *a*, *b*. The heir, too, must be of age, so as to be capable of thus protecting himself by entry. *Co. Litt.* 380, *a*, *b*. How the fact was, in relation to this matter, we do not know.

In 10 *Co.* 97, *a*, it is stated to be a maxim in law, that no warranty shall extend to bar any estate of freehold or inheritance, which is in *esse*, in possession, remainder, or reversion, and not displaced and put to a right, before or at the time of the warranty made, although afterwards, and at the time of the descent of the warranty, the estate of freehold or inheritance be displaced and divested; but, where the right is not in *esse* in the heir, or any of his ancestors, at the time of the fall of the warranty, that it shall not bind. *Co. Litt.* 388, *b*. Now, what was the situation of this estate, at the time the warranty was made?

*Ann Dent* was tenant for life, with a contingent remainder *in fee*, to any child or children she might have; and, in case she should die without ever having had such child,

1824. then in remainder, dependent on this contingency, *in fee*,  
*June.* to Mrs. *Duncanson*, and any other children of Mrs.  
*Urquhart,* *M'Cauley*; similar to the case of *Loddington v. Kyme*,  
*1 Salk. 224*, and other cases decided since that. It seems  
*Clarke, &c.* from that case, that this remainder would not even vest in  
 Mrs. *Duncanson*, until after the death of Mrs. *Dent*, who  
 survived her.

During the life of Mrs. *Duncanson* then, her husband,  
 the warrantor in this case, neither had, nor could he have,  
 possession in her right. He could only have taken such  
 possession, in the event that his wife had survived Mrs.  
*Dent*; so, that if he had never made the deed in question,  
 he could not, after the death of Mrs. *Dent*, his wife hav-  
 ing died first, been entitled as tenant by the courtesy; no,  
 not even if he had purchased in Mrs. *Dent's* life-estate,  
 and been thus in the possession of the land; but, even this  
 is not pretended. Suppose he had not made this sale and  
 conveyance, until after the deaths of his wife and of Mrs.  
*Dent*, and he had then entered, claiming as tenant by the  
 courtesy, and sold and made a deed, binding himself and  
 his heirs to a general warranty, this in fact would have  
 been nothing more than a disseisin; the conveyance would  
 not be by one entitled to courtesy; and, consequently,  
 the warranty would be void as beginning by disseisin; and,  
 if not, the heirs of the wife would not have been pro-  
 tected by the statute of *Gloucester*; but, being his heirs,  
 would be barred, assets or not, our statute, similar to that  
 of 4 *Anne*, ch. 10, not being then in force. But, the  
 estate would then have been displaced and put to a right,  
 by him, and his children would have entered and avoided  
 the warranty; that is, this would have been a collateral  
 warranty at common law, not within, or protected by the  
 statute of *Gloucester*. But, if this warranty binds, the  
 consequence is, that a conveyance and warranty, made be-  
 fore the remainder vested in his wife, and before he had  
 any right or title whatever, would avail more than one  
 made by him as tenant by the courtesy, after issue, death

of the wife and possession. In this last case, the heirs of his wife could have entered and avoided the warranty; and if not of age, would have been protected on that score, and at all events, would have been protected by the statute of *Gloucester* (which, I take it for granted, was in force here, until we passed a similar one) and would not have been barred without assets.

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The deed containing this clause of warranty too, is made, not only by one having no title, either in possession, reversion, or remainder; but, at most, only a mere possibility of right, and that partly dependent on his own will or pleasure, to get possession or not of the land, even if he should ever have the right to do so; but is made to one who had nothing in the land,—no previous estate, either by disseisin or otherwise. *Co. Litt.* 385, a. It is, moreover, not a deed of feoffment with livery of *seisin*, which might have displaced or disseised the right of some one; in which case the warranty might even have been void as beginning by *disseisin*; it was a deed of bargain and sale by one who, we must presume, was out of possession, as the title was in *Mrs. Dent*; and, which would not, therefore, even displace or divest her rights, so as to make an entry by her, necessary to avoid the warranty, had it descended on her; much less, it appears to me, could it divest a contingent remainder in his wife, which had not yet vested in her. He could not even have destroyed that remainder by a feoffment, or by fine and recovery, in England.

If this warranty, then, had been a general one, against himself and his wife, and all persons claiming under them, I do not see how it could be decided to be a good collateral warranty at common law, so as to bar his heirs claiming under their mother, whether they have assets or not.

This, as before said, I do not consider a conveyance by a tenant by the courtesy. He never was such. During the life of his wife, he never had a right to one moment's possession of the land, nor could he have had, in the event

1824. that happened, any such right after her death. It is, there-  
*June.* fore, not a case covered by the statute of *Gloucester*; and  
 Urquhart, if it is a collateral warranty, binding on his heirs, they  
*dec.* must be bound, as it appears to me, assets or no assets, as  
 v. Clarke, &c. at common law.

This renders it unnecessary for me to decide, whether, if this was a conveyance and warranty, within the statute of *Gloucester*, or our statute, and that to bar them, they must have assets, those assets must be *by descent*, or whether assets *by devise* is enough. My present impression is, that they must be *by descent*. My Lord COXE says, "they must be *by descent*, not by *purchase or gift*." *Co. Litt.* 374, *b.* Suppose the lands warranted to be worth \$10,000, and lands devised of the same value; but, \$9,800 worth is given to one, and \$100 each to two; and that the three are entitled equally to the lands warranted. Two of them, who are entitled to two-thirds, have then not received assets, either by descent or devise, of value equal to that which they are to lose. Again. As well the statute of *Gloucester*, as our statute, speaks of assets *by descent*.

I must be understood, however, as only throwing out my present impression on this point; inasmuch as, from the views before taken of the case, it is, perhaps, not important to decide this question.

Judge CABELL, concurred in the judgment to be rendered. But, he observed, that on many of the important points of law made in this case, he had experienced much difficulty; and that his mind was not yet entirely free from doubt. Should they occur in any future case, he should be glad to hear them argued again.

Judge BROOKE, concurred with the other Judges, that the judgment should be reversed, and entered for the lessors of the plaintiff.\*

\* Judges GREEN, and CARR, did not sit in this case; the former having been Counsel in the Court below; and the latter having been appointed since the argument.

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Where a deed of trust is impeached as fraudulent, the trustee may be a witness, if he has no interest in the support of the deed, and no participation in the alleged fraud.

If a married woman relinquishes dower in lands, under a promise that other property shall be settled on her as a compensation, such settlement will be good, although made after the relinquishment.

But if the value of the property settled exceeds the value of the dower relinquished, the deed should be set aside as to the excess, and supported as to the residue.

This was an appeal from the Richmond Chancery Court.

*James Taylor* filed his bill, stating, that he had obtained a decree against the representative of *Nathaniel W. Dandridge*, for a debt due by the said *Dandridge* in his life-time: that *Ann C. Moore*, the wife of *John S. Moore*, was a daughter, and one of the residuary legatees of the said *Dandridge*, and had received one-fourth part of the residuary slaves and personal estate of the said *Dandridge*: that the Court of Chancery accordingly decreed, that the said *John S. Moore*, holding the fourth part of the estate of the said *Dandridge*, as aforesaid, should pay to the complainant the sum of £296 6s. 9½, with interest on £185 5s. 3d. from the 7th day of September, 1807, till paid, and one-fourth part of the costs: that an execution was issued against the goods of the said *Moore* for that amount, and was levied on several slaves, which were the slaves that *Moore* had obtained upon the division of the said *Dandridge's* estate, or their descendants; that they were regularly advertised for sale, when a certain *George W. Payne* presented a deed for all the slaves in the possession of the said *Moore*, or which he had received from the estate of *Dandridge* as aforesaid, and their descendants, by which deed they were conveyed to the said *Payne* in trust for the said *Ann C. Moore* during her life, and to her children after her death; and forbade the sale: that no person being present to indemnify the Sheriff, the property was restored: that *John S. Moore* died soon afterwards, and no per-

1824. son has administered on his estate, the said *Payne* and  
*June.* *Ann C. Moore* having laid claim to the whole of it, under  
 Taylor the deed aforesaid: that the said deed was made without  
 v. consideration, long after the marriage of *John S. Moore*  
 Moore. and *Ann C. Moore*, and for the purpose of covering the  
 property from the creditors of the said *John S. Moore*,  
 who was at that time greatly indebted; but even if the  
 deed was good against other creditors, yet as these were  
 the slaves, or the descendants of those, which the said *Ann*  
*C. Moore* derived from her father, they are liable to his  
 claim; the said deed being made in the month of *April*,  
 1805, pending the suit brought by the complainant against  
 them, as above stated; in which the said *Ann C. Moore*  
 was a party, and therefore would be considered bound for  
 the said demand. The bill prayed that *George W. Payne*,  
*Ann C. Moore*, and *John S. and Ann C. Moore*, children  
 of the deceased, might be made defendants; and that the  
 said deed might be declared fraudulent and void, as to the  
 complainant.

The answer of *Ann C. Moore* states, that the deed from  
*John S. Moore* to *George W. Payne*, referred to in the  
 bill, was made under the following circumstances: About  
 the time that the deed was executed, the said *Moore* had  
 determined to dispose of his lands, which were very valu-  
 able, and which consisted of three tracts, one in *King Wil-*  
*liam*, and two in *Hanover*, and the defendant was advised  
 by her friends, that it was a duty she owed to herself and  
 her children, to insist that her husband, (to whom she  
 brought about ten valuable slaves on her marriage) should  
 make some settlement on her, which might serve for her  
 maintenance and that of her numerous family, and eventu-  
 ally as a provision for the latter: that under the influence  
 of this advice, it was distinctly agreed between her said  
 husband and herself, that he should make such a settle-  
 ment as is contained in the deed to *Payne*, in considera-  
 tion of the defendant's relinquishing her right of dower,  
 as aforesaid: that her relinquishments of dower were sub-

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sequent to, and induced by, solemn promises on the part of her husband, to make a settlement for the benefit of herself and her children, which promises were carried into effect by the deed before referred to; and that there was not any fraud on her part, or any intention to defraud, the complainant or any other person: that as to the allegation that the slaves contained in the deed from her husband, to *George W. Payne*, were the negroes derived from her father *Nathaniel W. Dandridge's* estate, or the descendants of such negroes, the defendant positively denies that such is the fact, except as to the slave *Alexander*; all the rest of the slaves in the said deed, being acquired by her deceased husband from his mother, *Ann C. Moore*, except the said slave *Alexander* and one named *Robin*: that as to *Alexander*, he was formerly the property of the defendant's father, but was sold in the life-time of her husband, to pay a debt due from him, and the defendant, to prevent an execution from being levied on the said *Moore*, with which he was threatened, agreed to give up her right in the said slave: that the slave *Robin* was purchased by the defendant's husband, of *Archibald Payne*, deceased, and was not acquired from her father's estate: that all the slaves acquired from her father's estate were sold to pay his debts: and the defendant believes, that in many instances, they went to pay debts which her deceased husband was bound for, as representing in part the said *Nathaniel W. Dandridge*, &c.

The answer of *George W. Payne* states, that about the time that *John S. Moore*, deceased, was selling off his lands in Hanover to remove to Richmond, to embark in the brick-making business, (in which he had no experience,) the defendant urged on Mr. and Mrs. *Moore*, that the former was in duty bound to his family, to make a settlement on his wife and children, in consideration of her relinquishing her right of dower in the said lands; and he urged upon Mrs. *Moore* the impropriety of giving up her right of dower, until such settlement was made: that the



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said *Moore* at first objected, but finally solemnly agreed, in presence of the defendant, and of *Mrs. Moore*, that if she would relinquish her dower, that he would make the settlement: that, in pursuance of this promise, the said *Moore*, on the 10th of April, 1805, executed to the defendant the deed in the bill referred to, which was regularly recorded in Goochland County Court: that he is well convinced that *Mrs. Moore* relinquished her right of dower, in consequence of the said promises and agreement, and that she would not have made such relinquishment, without the settlement; as she has repeatedly declared to the defendant: that, after the said deed was executed, the defendant considered himself as having complete control over the slaves thereby conveyed: that he hired out some of the slaves; and others which he deemed necessary for the support of *Mrs. Moore*, and her children, he suffered to remain with the family: that the defendant does not recollect or believe, that he ever forbade the sale of slaves taken under execution in a suit against the representatives of *Nathaniel W. Dandridge*, or any other, on behalf of the complainant against the said *Moore*: that he has been informed, and verily believes, that none of the slaves mentioned in the deed from the said *Moore* to the defendant, as trustee for his wife and children, were either negroes devised by the said *Moore* from the estate of *Nathaniel W. Dandridge*, or the increase of such slaves, except *Alexander*: that *Robin* was recovered in an action against the estate of *Nathaniel W. Dandridge*, bought by *Archibald Payne*, and by him sold to the said *Moore*: that *Alexander* was sold in the life-time of *John S. Moore*, to pay a debt of the said *Moore*; and *Mrs. Moore* having consented to relinquish her right in the said slave, the defendant did not interfere at the time, nor has since brought suit; and the defendant conceiving that the said deed was executed in good faith, and for valuable consideration, thinks it would be very unjust to deprive them of the said property.

The suit abated by the plaintiff's death, and was revived against his executor.

The other defendants answered, relying on the answers of *Ann C. Moore* and *George W. Payne*.

The deposition of *Benjamin Sheppard* states, that in the year 1804, *Nathaniel, Benjamin* and *John Sheppard*, purchased of *John S. Moore*, a house and lot in the City of Richmond; that a few days after the purchase, and before a deed had been executed by *Moore* and wife, *Moore* applied to the said *Sheppards* for some money on account of the said purchase, when the deponent refused to let him have any money before a deed with a complete relinquishment of dower was made, and that he must have an opportunity also of getting some information respecting the title to the said house and lot, as the deponent had been informed that all his, the said *Moore's* property, had been conveyed to *G. W. Payne* in trust for the benefit of Mrs. *Moore* and her children. The said *Moore* observed, that there was no such conveyance, and that there never had been. A few days after, when the deponent went to the house of the said *Moore*, with two magistrates, for the purpose of taking Mrs. *Moore's* relinquishment of dower, Mrs. *Moore* observed to the deponent, that her feelings had been very much hurt at the observations made by the deponent, concerning the title of Mr. *Moore's* property, and observed, that *Moore's* property was as free from incumbrance as any man's on earth, and that Mr. *G. W. Payne* had not at that time, nor ever had, any incumbrance on any part of *Moore's* property. The deponent levied an execution on the 30th day of January, 1807, on one of *Moore's* negroes; and on the day of sale, *G. W. Payne* observed to the deponent, that this negro, together with many others, was conveyed by *Moore* to him, in trust, for the benefit of Mrs. *Moore* and her children; but, that it was not his intention, nor that of Mrs. *Moore*, to prevent the property from being sold for the payment of any of *Moore's* just debts, and executed to the deponent a

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relinquishment to the said negro, by giving him full power to sell him, to satisfy the said execution. The said *Payne* further observed, that the said *Moore* had been in the habit of making a great many injudicious bargains, and that it was the intention of the said *Moore*, his wife, and of him, the said *Payne*, to secure the property, so as to prevent it from being sold to satisfy any debts of that description.

The deposition of *George Underwood* states, that some time after *Moore* removed from Richmond, the deponent heard *G. W. Payne* say, that he had got the said *Moore* to convey the whole of his property to him in trust, in order to prevent it from being taken to pay his debts; but afterwards observed, that if care and economy were used, the estate, by its profits, would be sufficient to pay its debts.

The deposition of *George W. Payne* was also taken. He deposed, that some years ago a deed was made for a number of negroes, by *John S. Moore* to his wife, in which he was made trustee; and he believes that the deed was made in consequence of his having advised Mrs. *Moore* never to relinquish her dower to certain lands, sold by *Moore* to *Samuel Mosby*, unless *Moore* would secure her as much property, at least, as the dower was worth. This conversation took place in presence of *Moore*, and gave him great offence; but, shortly after, he promised that he would do as the deponent had advised Mrs. *Moore*; on which promise, the deponent then advised Mrs. *Moore* to relinquish her dower; which, after some time, was accordingly done; that he has no recollection of the conversation stated in *G. Underwood's* deposition, and is certain that if such a conversation ever took place, it has not been fairly represented; that he believes the property of *Moore*, independent of that conveyed by the deed, was more than sufficient to pay his debts; that he understood that *Moore* sold the said land to *Mosby*, for three or four thousand pounds; that the trust estate consisted of personal property, and chiefly of negroes, which were, in general, young and expensive, &c.

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*Samuel Mosby* deposed, that the land he purchased of *Moore* cost £3,400; that he thinks *Moore* had not property enough to pay his debts, at the time of executing the trust deed; and does not know whether the property conveyed in the trust deed, was worth more than the dower relinquished in the land conveyed to him and others.\*

The Chancellor decreed, that as *John S. Moore* had received, in his life-time, that part of the estate of *Nathaniel W. Dandridge*, to which *Mrs. Moore* was entitled as residuary legatee of her father, and had executed a re-funding bond to the executor of that estate, that *his* estate, and not the said *Ann C. Moore*, is liable for that proportion of the debt due to the plaintiff; that the property conveyed by the deed of trust to *G. W. Payne*, is not subject to the payment of the said debt: that from the evidence, the said property was conveyed in consideration of *Mrs. Moore's* relinquishment of dower, and the trust property is not proved to exceed in value, the value of the dower relinquished; and, that the bill should be dismissed, without prejudice to any other suit that the plaintiff might be advised to bring against the personal representatives of *Nathaniel W. Dandridge*, for the recovery of the demand in the bill mentioned.

The plaintiff appealed.

*Stanard*, for the appellant.

*Nicholas*, for the appellee. ‡

June 16. The Judges delivered their opinions.†

Judge GREEN.

Although the first question in order in this cause, seems to be, whether the evidence given by *George Woodson*

\* For a more particular statement of the evidence, see Judge GREEN's opinion.

† Judges CARR and BROOKS, did not sit in this cause.

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*Payne*, the trustee and one of the defendants, was competent and admissible or not; yet as the fate of that question may, in some measure, depend upon the other matter of the record, it is proper to enquire, first, how the case would stand, exclusive of his testimony.

*James Taylor*, the testator of the appellant, in 1788, instituted a suit in Chancery against *John S. Moore* and *Ann Catharine* his wife, and others, of whom *George Woodson Payne* was one; and on the 27th of February, 1809, recovered several decrees against several of the defendants, and among others, *J. S. Moore*. Pending this suit, on the 10th of April, 1805, *John S. Moore* conveyed to *George W. Payne*, 17 slaves, a coachee and harness, 2 horses, 2 mules, 4 milch cows, 2 calves, and all his household and kitchen furniture. The deed purports to be made for the consideration of £1,000 paid by *Payne* to *Moore*, in trust that, "whereas *Ann Catharine Moore*, the wife of the said *J. S. Moore*, is entitled to dower in sundry tracts of land, which the said *J. S. Moore* is desirous of selling and disposing of. This writing, therefore, witnesseth, that in consideration of a relinquishment of dower in three separate pieces, parcels or tracts of land, two of which tracts of land are lying in the County of Hanover, and in the aggregate, contain 1,236 acres, and the other, in the County of King William, containing 500 acres;" the said *Payne* was to stand seised and possessed of the property to the use of the said *Ann C. Moore* for life, and to the use and benefit of such child or children (in equal shares) as the said *J. S. Moore* may now have or shall hereafter have begotten on the body of the said *Ann Catharine Moore*. Upon the decree aforesaid against *Moore*, an execution of *fi. fa.* issued on 16th day of November, 1809, upon which the officer, *Benjamin Shepard*, returned that he had executed it on 4 of the negroes mentioned in the said deed, and the sale had been forbidden by *G. W. Payne*, trustee for Mrs. *Moore*, whereupon he had surrendered the property. In October, 1810,

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*Taylor* exhibited his bill against *Payne* the trustee (*Moore* being dead insolvent, and no administration on his estate) and the *cestui que trusts*, stating in substance, the facts aforesaid, and charging that the said deed was made without consideration, long after the marriage of *Moore* and wife, and for the purpose of covering the property from the creditors of *Moore*, who was then greatly indebted; and prays, that the deed may be declared fraudulent and void as to the plaintiff, and for general relief; but calls, in terms, for no discovery of the consideration of the deed.

The answer of Mrs. *Moore* states, that about the time the deed in question was executed, her husband had determined to dispose of his lands, which were very valuable. They consisted of three tracts, one in King William, and two in Hanover; and that she was advised by her friends, that it was a duty she owed to herself, and her children, (ten in number, at her husband's death, and one born afterwards,) to insist that her husband (to whom she brought ten valuable slaves in marriage,) should make some settlement on her, which might serve for her subsistence, and that of her numerous children, and eventually as a provision for the latter: that, her husband admitting this advice to be correct, it was distinctly agreed between her husband and herself, that he should make such a settlement as that contained in the deed, "in consideration of her relinquishing her right of dower as aforesaid:" that she does not remember whether the said deeds (of relinquishment, I suppose,) preceded or followed the deed to *Payne*; yet, she positively avers, that the said relinquishments, whatever were their dates, were subsequent to, and induced by, solemn promises on the part of her husband, to make a settlement as aforesaid; and positively denies fraud. She does not believe (never having heard so,) that the plaintiff's execution had ever been levied upon any of the trust property; states, that she had consented to the sale of *Alexander*, one of the trust slaves, for the payment of a debt of *J. S. Moore*, to prevent an execution from being levied on *Moore*; she giving up her right in the slave so sold.

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The answer of *G. W. Payne* states, that when *J. & Moore* was selling off his lands in Hanover, to remove to Richmond, where he was about to engage in the brick-making business, in which he had no experience, he urged upon Mr. and Mrs. *Moore*, that he was in duty bound to his family, to make a settlement on his wife and children, in consideration of her relinquishing her right of dower in said land, and urged Mrs. *Moore* not to relinquish her right of dower, until such relinquishment (I suppose, *settlement*,) was made: that *Moore* at first objected; but, finally, solemnly agreed, in his presence, with Mrs. *Moore*, that if she would relinquish her claim, he would make the settlement: that, in pursuance of this promise, the said *Moore* executed, on the 10th of April, 1805, the deed in question to him: that he believes that the deed to *Mosby* by *Moore* and wife, was executed before making the deed in question; but, he is well convinced, that Mrs. *Moore* relinquished her right of dower, as aforesaid, in consequence of the said promise and agreement: that, after the deed was executed, he considered himself as having complete control of the property conveyed, hired out some of the slaves, and others he left with the family, for the support of Mrs. *Moore*, and her children. He does not recollect that any of the negroes were taken under the plaintiff's execution, and does not recollect or believe, that he ever forbade the sale; and insists that the transaction was *bona fide*.

The other answers are wholly immaterial. The deed from *Moore* and wife to *Mosby* for one tract of the Hanover land, is dated October 16, 1799, and Mrs. *Moore* was privily examined in the District Court, on the 11th day of April, 1800. The deed to *Mosby*, for the other tract of land in Hanover, was executed by *Moore* and wife on the 15th of July, 1800, and Mrs. *Moore* was privily examined in the District Court, in September following. The consideration of the first deed was £1,400; of the second, £2,000. No conveyance is exhibited for the King Wil-

liam land; nor does it appear ever to have been sold by *Moore*; and, for any thing that appears, she now enjoys her dower in that tract of land.

*Benjamin Sheppard* testifies, that in 1804, *N. B. and J. Sheppard* purchased a house and lot of *J. S. Moore*: that, a few days after, and before a deed was made, *Moore* applied to him for the payment of some money on account of the purchase: that he refused to pay him any, until a complete deed, with *Mrs. Moore's* relinquishment of dower, was made, and until he could make some enquiry as to the title of the house and lot; he having heard that all *Moore's* property was conveyed to *Payne*, for the benefit of *Mrs. Moore* and her children. *Moore* affirmed that there was no such conveyance, and never had been. A few days after, he waited on *Mrs. Moore*, to execute the deed for the house and lot, when she said she had been very much hurt at his observations, made as before stated, to *Mr. Moore*: that *Mr. Moore's* property was as free from incumbrance as any man's on earth; and that *Mr. Payne* had not, and never had, any incumbrance on his property. The witness further states, that in January, 1807, he levied an execution against *J. S. Moore*, on old *Tbm*, one of the negroes mentioned in the deed of trust: that *Payne* consented that the negro should be sold to satisfy the execution, and said that this negro, with many others, was conveyed to him by *J. S. Moore*, in trust for *Mrs. Moore*, and her children; but, that it was not his intention, nor the intention of *Mrs. Moore*, to prevent the property from being sold for the payment of *Mr. Moore's* just debts; and observed, that the said *Moore* was in the habit of making a great many injudicious bargains, and that it was the intention of *J. S. Moore* and *Mrs. Moore*, and of the said *Payne*, so to secure the property as to prevent its being sold to satisfy any debts of that description. He further said, that, in addition to the consideration before mentioned, the deed was made in consideration of *Mrs. Moore's* having relinquished her right of dower to

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a tract of land sold by *Moore* and wife to *S. Mosby*, several years before; and, in answer to an interrogatory by the witness, he said that the execution of the deed of trust had been delayed for no particular cause, but he considered it was entitled to the same force, as if it had been executed on the day the relinquishment of dower was made, as he considered it as a continuation of the contract. This witness, together with *N. and J. Sheppard*, had, when he was examined, a cause depending in Chancery against *J. S. Moore's* representatives and *Bernard Moore*; the object of which does not distinctly appear, but was probably, amongst other things, to set aside this deed.

*George Underwood* testifies, that some time after *J. S. Moore* removed from Richmond, he heard *G. W. Payne*, at *Archibald Dandridge's* house, in presence of said *Dandridge* and others, say, that *J. S. Moore* had conveyed the whole of his property to him, in trust, in order to prevent its being taken to pay his debts; but afterwards observed, if care and economy were observed, the profits of the estate would be sufficient to pay its debts.

*Samuel Mosby* testifies to his purchase of the land in Hanover for £ 3,400; that *Moore* purchased another tract of land for £ 1,000, of which £ 500 remained due; that he thinks *John S. Moore*, when he sold the land to the witness, had other property sufficient to pay his debts, but not sufficient at the time he executed the deed to *Payne*; he knows not the names, age, or value of the negroes conveyed, either when conveyed, or when the deposition was taken; but supposes, (having seen the deed) that the trust property does not exceed in value the dower interest. The residue of this witness's testimony is either irrelevant, or hearsay, without stating from whom.

*Archibald B. Dandridge* testifies, that to the best of his recollection, he did not hear *G. W. Payne* make the declaration to *Underwood*, stated in his deposition: that he has often heard *G. W. Payne* say, that the deed was made in consequence of *Mrs. Moore* relinquishing her

right of dower in certain property, and that he had always advised Mrs. Moore not to relinquish her right of dower, unless J. S. Moore would make over property in lieu of it.

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Mary Ellis deposes, that she has heard J. S. Moore say; that he had given his wife several negroes, in lieu of her dower in the tract of land sold to Mosby.

Robert H. Dandridge testifies, that he heard J. S. Moore say, that he did not convey his property to prevent the payment of his debts, but he had conveyed it in lieu of his wife's dower.

To the understanding of the effect of this evidence, it is proper to enquire what were the issues made up between the parties, and upon whom the *onus probandi* lay, in respect to such issues.

1. The plaintiff affirms, that the deed in question was actually fraudulent and voluntary, which the defendants deny.

2. The defendants alledge, that the deed was made, not upon the considerations specified in the deed, but upon other considerations of the same nature (but the answers differ as to the particulars and extent of the alledged considerations) which the plaintiff puts in issue by his replications.

3. The plaintiff alledges that Payne, by his interference, prevented a part of the trust property from being sold under the plaintiff's execution, which the defendants deny in such a way (though not positively) as to put the fact in issue.

As to the first and third issues, the *onus probandi* lay upon the plaintiff; the general rule being, that he who holds the affirmation of the issue is bound to prove the affirmation on which he relies. *Phill. Evid.* 156.

As to the second issue, the *onus* lay on the defendants for the same reason. Although it be true, that when the plaintiff seeks a discovery from the defendant as to any matter of fact, he thereby, as to the matter so sought to be

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discovered, makes the defendant a witness, and therefore the answer is evidence for the defendant, so far as it is responsive to such bill; yet, as to a matter in respect of which the bill seeks no discovery, if the answer alledges any thing affirmatively, it is not evidence for the defendant, but is to be proved by him. In this case, the bill seeks no discovery, whether any other consideration was given by Mrs. Moore, than that specified in the deed.

Although the deed itself in this case, in the absence of all other evidence, would be evidence that the consideration, therein specified, was the true consideration, upon which the deed was made; yet the plaintiff, having proved that the consideration specified in the deed, and purporting to be future, was impossible, because the dower in two of the tracts of land mentioned in the deed, had been relinquished near five years before the deed was executed, and it not appearing that the dower in the third tract of land was ever relinquished, has thereby shewn *prima facie* that the deed was voluntary, and therefore fraudulent as to the plaintiff, who was a creditor of Moore at the time of the execution of the deed, and then prosecuting a suit for the recovery of his debt. Against this proof and its consequence, the defendants have nothing to oppose, but the declarations of J. S. Moore and Payne, made after the execution of the deed, (and therefore not competent to be given in evidence, in support of the validity of the deed,) that the deed was made in consideration of a contract on the part of Moore, made five years before the execution of the deed, to compensate his wife for her relinquishment of her dower in the lands sold to Mosby; and the naked fact, that Mrs. Moore had actually released her dower; from which it is attempted to be inferred, that such an agreement for compensation had been made. To tolerate such an inference would be practically to authorise every man, whose wife had voluntarily and gratuitously relinquished her dower in his lands, at any distance of time, and when a change of her circumstances made it expedient to provide

for his wife and children, and virtually for himself, to the prejudice of his creditors. Such an inference would be contrary to the practice of the country; for, the relinquishment of dower by the wives of persons in tolerably good circumstances, is usually made without any contract for compensation. And such an inference is, in this case, conclusively repelled, by circumstances which so strongly negative the allegation of such a contract, that even if the answers were, in this respect, responsive to the bill, they would be over-ruled by the evidence and circumstances of the cause. 9 *Cranch*, 160.

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Even if it were admitted, (which is doubtful at least,) that it was competent to the defendants to insist upon a consideration, different from, though of the same nature as that stated in the deed, *Clarkson v. Hanway*, 2 P. Wms. 203; 2 Sch. & Lefr. 501; yet the discrepancy between that stated in the deed, and those relied upon in the answers, affords, in connexion with other circumstances, strong evidence of fraud.

Other circumstances which negative the pretensions of the defendants, and from which fraud may justly be inferred, are, that the deed was not executed until five years after the pretended contract: that the contract was a profound secret to all the world, except Mr. and Mrs. Moore and the trustee *Payne*, from the time it is alleged to have been made, until a short time before the deed was executed: that Mrs. Moore herself affirmed that her husband's property was free and unincumbered, shortly before the execution of the deed, when, if her present claims were well founded, she was entitled to a provision out of his estate, equivalent to the whole which remained: that the deed was made, pending the plaintiff's suit: that it embraced all Moore's personal property, as may be justly inferred from the terms of the deed itself, and the evidence of Mosby: that it was made in contemplation of Moore's insolvency: that both the trustee and Mrs. Moore had consented to the sale of a part of the property, under execution for the

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payment of *Moore's* debts, disregarding the interest of the children: that the trustee had declared, after the making of the deed, that it was made to cover *Moore's* property, from the claims of his creditors, and made other statements inconsistent with the defence now set up: that there is manifestly a great disparity between the value of the dower relinquished, and the compensation pretended to be given therefor. As to all these badges of fraud, see *Rob. on Fraud. Con.* 34, n. 67, 526, 418, 559, 189, 577, 16, 573, 27, n. 21; 9 *Rep.* 11; 10 *Ves.* 151; *Amb.* 596; 8 *Co.* 80; 1 *Vern.* 459; 13 *Vin. Fraud, C. pl.* 2, 3, *N. s. pl.* 2; *Taylor v. Jones*, 2 *Atk.* 602.

These circumstances are so ambiguous, and so inconsistent with the ordinary course of *bona fide* transactions, as to be conclusive evidence of the fraudulent intent, with which the deed was made; and to justify a Court of Equity in treating it as void against the creditor in this case, without the intervention of a jury.

All these facts have been properly given in evidence against Mrs. *Moore*, and consequently, against her children, who claim through her. A married woman, being *capax doli*, is not protected against the consequences of fraud, practised exclusively by herself, or in conjunction with others, at least to the extent of precluding her from claiming any benefit from her fraud, or from the fraud of another, of which she was conscious, as in the case of an infant. *Bauerman v. Radenius*, 7 *T. Rep.* 664, 670, n.; 1 *Fonb. Eq.* 76; 10 *Ves.* 161; *Phill. Evid.* 74, 75. Her acts and declarations are, therefore, evidence against her, as are the acts and declarations of *Payne*; because his legal title is the only impediment to the plaintiff's demand; and if he were plaintiff at law, they would be competent evidence; and because the acts and admissions of all who have acted jointly for attaining a given object, are mutually evidence against each other as to such object.

Although if a fair foundation for such a conveyance had been laid in proof of a *bona fide* consideration, and there

were no grounds to impute fraud to the transaction, other than the inequality of the values of the consideration and the compensation, the transaction might be favoured, so far as not to weigh nicely the respective values of the things given and received, (unless the inequality was so gross as, in itself, to amount to evidence of fraud, as in transactions between strangers;) yet where there is other evidence of actual fraud, such inequality, although not solely sufficient to establish the fraud, is a circumstance entitled to great weight.

If there had been proof of such a consideration and original contract, as are insisted on, this case would have been like the cases of *Quarles v. Lacy*, 4 Munf. 251; and *Blanton v. Taylor*, Gilm. 209; where the inequality of value was corrected, and the wife was permitted to retain to the value of the dower interest, surrendered in the confidence that she was getting an indemnity. Those cases turned upon this consideration; that the wife, in the confidence founded on an actual contract with the husband, that she would have a compensation for her dower, had relinquished it; and the fraud was imputed solely to the husband, as otherwise the wife might be irreparably injured. But her privity to the fraud had still the effect of limiting her strictly to an equivalent.

Upon this view of the case, I think *Payne's* evidence was inadmissible. But, if it were otherwise, I should think that it would lead to an issue to be tried by a jury; since the other facts in the case so strongly contradict his testimony. It is true, that a naked trustee, against whom no claim can be had, either for costs or otherwise, is a competent witness for his *cestui que trusts*. Yet, when his title is impeached upon the ground of actual fraud, in which he participated, he is incompetent, because he is liable for costs, and for other consequences, according to the circumstances of the case; as here, if the plaintiff succeeded, *Payne*, if it became necessary for the purpose of satisfying the demand, would be liable to account for the hires and profits of the slaves received by him, as stated in his an-

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swear. A *particeps fraudis* is not only liable for costs, but may be otherwise liable; and is not permitted, by his own evidence, to repel the charge of fraud in which he participated. 1 *Mod. Rep.* 107; *Goss v. Tracy*, 1 P. Wms. 287; 1 *Black. Rep.* 366; *Gilb. Evid.* 123; 1 *Doug.* 140; 12 *East.* 250; 4 *Taunt.* 328; 6 *Taunt.* 220; 1 *Ball and Beatty*, 104, 414; 2 *Vin.* 287; *Harr. Ch. Prac.* 566; *Phill. Evid.* 42, 48; *Amb.* 592; 2 *Ves.* 628-9; *Croft v. Pyke*, 3 P. Wms. 180. In addition to the other matter in this cause, it appears by *Payne's* own deposition, (which may be resorted to for the purpose of shewing his interest, without reading it as evidence in chief,) that when *J. S. Moore* presented him a deed, which he supposed was made in pursuance of the contract now insisted on by the defendants, he rejected it as no better than blank paper; and he himself caused the deed which was executed, to be prepared. He then caused a deed to be prepared, reciting a consideration which he knew to be false, and conveying the whole personal property of a man in insolvent circumstances, which property grossly exceeded in value the pretended consideration. He repeatedly avowed, that the deed was intended to defeat *Moore's* creditors, and treated the property, in some respects, as *Moore's*. He was, therefore, not only *particeps fraudis*, but seems to have been the principal agent in, and contriver of, the fraud.

The third issue is immaterial; but, if it were material, I should think that the plaintiff had failed in his proof; the return of the Sheriff being no evidence against the defendants, especially as the Sheriff was examined as a witness, and not interrogated as to that fact.

It is admitted, that the deed was fraudulent in conveying, under pretence of making to *Mrs. Moore* a just equivalent for her dower, property to three or four times the value of her dower interest. If she had been a person *sui juris* and privy to this, it would have avoided it *in toto*; but being a married woman, this fraud is not to be imputed to her, nor to her children, who were probably infants,

and who do not seem to have had any agency in the transaction. To whom then is this fraud to be imputed? To *Moore* and *Payne*, especially the latter. He was the brother-in-law of *Moore*; was the adviser of the original arrangement; no doubt knew well the value of the dower interest; and took an active part in preparing the deed, and, indeed, was the sole actor in that respect. He is the only party to this fraud, who is before the Court. But for this fraudulent excess in the pretended compensation to Mrs. *Moore*, the plaintiff's demand might have been satisfied without difficulty, near fifteen years ago; and he would have avoided the delay and expense and vexation of this protracted litigation. Who, then, ought to pay the costs of this suit? Not Mrs. *Moore*, or her children; who, (upon the supposition that the deed is good to the extent of a just compensation for her dower relinquished,) are innocent; but *Payne*, the only party to the fraud which has produced all this mischief, who is before the Court.

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I think the decree should be reversed, and the deed declared to be fraudulent and void.

Judge COALTER.

The affirmance of this decree, so far as it declares the deed of trust valid, depends much on the question, whether *George Woodson Payne*, the trustee in the said deed, is a competent witness.

It is admitted on all hands, that if he is, *bona fide*, and without combination or participation in any fraud, (if any has been committed in this case,) a mere naked trustee; and has done no act subjecting him to any suit, in consequence of his being trustee as aforesaid; and if the case, independent of his evidence, shews this to be his condition, that then he is a competent witness.

But, it is said, that although he may be, *bona fide*, an innocent naked trustee, as aforesaid; yet, that if the appellees are unable to prove the real consideration of the deed,



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stated in the answer, that deed must be declared fraudulent and void as to creditors; and, that although he might have been ignorant that the consideration expressed in the deed was not the true consideration, yet that *legal*, if not *actual* fraud is imputable to him, and that this is enough to exclude him.

The deed, upon the face of it, expresses the consideration of £1,000 paid by the trustee; but the declaration of the trust states the real consideration, to wit: *her relinquishing dower in lands her husband, the grantor in the deed of trust, wished to sell.* Now, although the trustee might well know that he had never paid the £1,000, or the \$100, or \$1, which might have been stated as paid by him to the grantor; yet the deed does not inform him, that the other consideration was incorrectly or untruly stated. *Payne* does not subscribe the deed, and consequently, it does not appear from it, that he was present at its execution, or had any agency in procuring it to be executed.

Suppose the deed had stated, what Mrs. *Moore*, in her answer, says was the true consideration, to wit: *that when she relinquished her dower in the lands mentioned in the deed, her husband had promised to settle property on her, &c.*; and, that the deed was made in consideration of that promise. This statement in a deed made after marriage, would not have been conclusive on the creditors of the husband. It might, in fact, not have been true; or the deed might have conveyed more than a just equivalent. But, if the trustee was ignorant of its falsehood, and had no agency in procuring this false and feigned consideration to be expressed in the deed; he surely could not be responsible for this fraud committed by others, *unless the second proposition above stated, is correct.*

It will perhaps be right to throw out of this enquiry, the answer of *Payne*. But, if any part of it is relied on to shew his agency, or to charge him with any responsibility, then I think it but justice to take it all together, and

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give it all the force of an answer; in the same manner as if we were now about to inculcate him with an actual fraud, and subject him to damages, in consequence thereof. So too, if any part of his deposition is resorted to, in order to prove acts in him, which might subject him to an action; surely it will be right to take all that he says, in order to see whether he has been guilty of actual fraud. We must decide on his liability, according to what appears in this case, not according to what we might suppose would appear in another case. We know not what would be proved, on either side, in such other case.

His answer, if it is to be taken into view, shews that he is innocent of any fraud, and particularly of that charged in the bill, and of which he is not even charged of having any knowledge; viz. *that the deed was made long after marriage, and without consideration.* In considering this point, it may also be worthy of remark, that there is no charge of any fraudulent combination on the part of the trustee, to defeat creditors; but he seems to be treated as a mere naked trustee, having the legal title in him of a subject, which, though in him under a deed good between the parties, is nevertheless alledged to be void as to the creditors. It does not even alledge the fact, of which he might have been ignorant, that the lands spoken of in the deed, and for which, it would seem, she was to relinquish her dower, had been conveyed and the dower relinquished long before the execution of that deed.

The answer of his co-defendant, it is true, admits that the consideration expressed in the deed is not strictly correct. She states, that she had agreed to relinquish her dower, on a promise by her husband to make a settlement, without which promise, solemnly made, she would not so have relinquished; but whether the deed of trust was before or subsequent to the relinquishment, she knows not. It turns out that it was subsequent; but if she was ignorant of this, so might the trustee be also. She of course could not have been present at its execution, having trust-

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ed to her husband and friend to see it done. Being neglected by them, however, until after she had relinquished, the statement in the deed that she was to relinquish, was substantially, though not literally, true. All then that could be said as to the trustee, had he known the facts stated in her answer, and been also apprised that she had already relinquished her dower, would be, that the deed *substantially*, though not *literally*, recited a good and valuable consideration; that it was now executed as it would have stood, had it been executed at the proper time. This is not such a false consideration, as to inculcate him with actual fraud; for it could do no injury; was in substance true; and the creditors equally at liberty to controvert it, as they were to controvert the *literal* truth, had it been stated. Besides, this misrecital of the facts, as the case then stood, could not be such a fraud as to preclude the wife from stating and substantiating the case as it really was; *Blanton v. Taylor*, Gilm. 209; and unless it is such a transaction as will bind her to the words of the deed, so that she cannot go back to the origin of the transaction, it cannot bind her trustee thereto. But this has not been pretended in the argument.

But it is said, that an execution in favor of the testator of the appellant, was levied on the trust property, and that the Sheriff returned, that the sale was forbidden by *Payne* as trustee, and no person appearing to indemnify, the negroes were delivered to him.

This execution is dated in November, 1809; in the lifetime, as I understand, of *Moore* the husband. The answer of Mrs. *Moore* says, that she never heard of such execution being levied; and so does *Payne*, if his answer is to be regarded. It will appear hereafter, that the deputy Sheriff who made this return, knew of this deed of trust previously, and may have been told that the sale would be disputed, and did not deem it necessary to go to the trouble of actually levying the execution. If the negroes were levied on and taken away without a delivery bond, and

kept until the day of sale, it is strange that these parties should be ignorant of it, or that it could not be proved. The return does not state, that a delivery bond was taken. This return may be evidence against the Sheriff, but is no evidence against the parties. This point was certainly not deemed important, or it could have been proved, if the fact existed; but even this very deputy Sheriff, who is examined for the appellant, is not examined as to this point.

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But it is said, that this interposition by the trustee subjects him to an action, if the deed is avoided. True; even the making of the deed, if he united and conspired to commit a fraud on creditors, may subject him to an action for any injury flowing from that deed; but if he can be so inculpated, it will not be contended that he is a competent witness, whether he did this or not.

But, if he believed the deed to be on *bona fide* consideration, although the parties interested may be unable to prove that consideration, it is admitted that it would have been his duty to forbid the sale, and force the testator of the appellant to give bond to indemnify the Sheriff; and resort to his bill in equity, as he has done. Unless then, the second proposition can be maintained, that the trustee is to be answerable, *even for doing his duty*, because the deed is finally set aside, I cannot perceive that this act, if it had been proved, would have made him incompetent.

But, it is said, that the witnesses prove, that no such consideration, as that stated in the answer, did exist; that the trustee knew it, and that this proof is even strong enough to ascertain his disposition, if read in the cause; and that, consequently, he is chargeable as for *actual fraud* and combination, and so cannot be heard as a witness. *Benjamin Sheppard*, the deputy Sheriff who made the return aforesaid, is examined. He says, that in 1804, he, with others, purchased a lot in Richmond of *J. S. Moore*, and being called on for some money before the deed was made, it was refused on the allegation, that they had heard that he, *Moore*, had conveyed all his property

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 June and that they must have some time to get information as to  
 Taylor the title; and that both *Moore* and his wife said his prop-  
 Moore. erty was clear from incumbrance. But, it will be observ-  
 ed, that the subject of this purchase was real estate; and it  
 is not pretended that any of his real estate was ever con-  
 veyed to *Payne*; and, moreover; that this was before the  
 deed of trust in question, of slaves, &c., which was execu-  
 ted in 1805. But, this shews, that a deed in her favor,  
 with *Payne*, her friend, as trustee, was then spoken of as  
 having been executed; as it ought to have been years be-  
 fore that; and is a circumstance corroborative of her an-  
 swer; and even if that deed had been executed, or she had  
 believed it had been executed, this conversation as to the  
 real estate, which was, and remained unincumbered, would  
 have had no bearing on it. He says, further, that in 1807,  
 he levied an execution on one of *J. S. Moore's* slaves, old  
*Tom*, he thinks, and that, on the day of sale, *G. W.*  
*Payne* told him of the deed of trust to him, of this slave,  
 and many others, for the benefit of *Mrs. Moore*, and her  
 children; but, said it was not *his intention*, or *that of*  
*Mrs. Moore*, to prevent the property from being sold for  
 the payment of any of *Mr. Moore's* just debts, and that  
 he executed to the deponent a relinquishment.

The witness further proves, that *Payne* said that *J. S.*  
*Moore* had been in the habit of making injudicious bar-  
 gains; and that it was the intention of the said *J. S.*  
*Moore*, *Mrs. Moore*, and him the trustee, so to secure the  
 property, as to prevent its being sold to secure the pay-  
 ment of debts of that description. So far, this witness is  
 very minute as to every thing that will shew a fraud in the  
 trust; insomuch that he either imputes to *Payne* a down-  
 right falsehood, fabricated for the purpose of destroying  
 his own deed, or that *J. S. Moore* admitted *his own habit*  
 of making injudicious bargains, and a wish thus to prevent  
 their payment. Some men are willing rather to be thought  
 knaves than fools; but, here is one who, from this account,

is willing to be thought both. I hardly know which is the most improbable story of the two. Neither, supposing the witness to stand fair, can he be accounted for, except that after the lapse of five years (which had passed over between the circumstances spoken of, and the time of taking the deposition, during which, or a part of which time, the witness had been pondering on those circumstances, under the influence of interest,) he may have been led into an error on this subject. He is asked, whether he and others have not a suit pending, to set aside this deed, as being void as to creditors? If he had no such suit depending, he could have answered, *no*. But, he says, a suit is depending by himself and others against the representatives of *J. S. Moore* and *B. Moore*, the object of which will appear by a reference to the record. Would he have referred to this record, which might cost the parties great expense to produce, if he could at once have given the answer *no* to this question? I think not; or, if he could, he has, to say the least, a leaning against the appellees. I take it that he is interested in setting aside this deed, though he may be considered as not interested in this suit; and that, as before said, he has dwelt on these conversations, under the influence of interest, until he really thought what he said was true. How else can we account for his totally forgetting (for, I will not impute a wilful suppression of truth,) what he honestly confesses, when reminded thereof, by cross-interrogatories? He is asked, whether *G. W. Payne* or *Mrs. Moore* stated any consideration for the conveyance; or, if he understood that it was intended merely to prevent a further credit to *J. S. Moore*? He says, (not in the precise words I use, but in substance; for, were I to use the very words, some confusion might appear in the witness, which I do not wish to impute to him,) that, in addition to the consideration before mentioned, (that is, the consideration of defrauding creditors,) *Payne* did say the deed was made in consideration of *Mrs. Moore* having relinquished dower

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to land sold by Moore and wife to Mosby, several years before the deed of trust; and that the witness asked him, why the deed of trust was not executed at the time; to which he answered, that it was delayed for no particular cause, but that he considered the deed was entitled to the same force, as if it had been executed on the very day the relinquishment of dower was made; as he considered it a continuation of the contract. It is said, however, that this is proof of a mere declaration of Payne, that the deed was executed after the relinquishment. But, even in that view, it goes a great way. Else, why ask, why it was not executed at the time? And why, if only thought of after, should it have been as good, as if made when she relinquished her dower? And how could it be a continuation of a contract, if none had been made?

Instead, then, of an acknowledgment that this deed was altogether intended to defraud creditors, it turns out from all that was said, to be a deed for valuable and fair consideration; but, which the parties, for reasons best known to themselves, did not wish to enforce against this creditor;—perhaps a small debt, concerning which, they did not wish to involve themselves in a dispute. This witness, then, shews nothing unfair in the trustee, which creditors can complain of; and it does not appear, that the *cestui que trusts* have complained.

George Underwood says, that he heard G. W. Payne say he had got J. S. Moore to convey the whole of his property to him, in trust, in order to prevent its being taken to pay his debts; but observed, if care was taken, the estate, by its profits, would pay his debts. This, he says, passed at the house of Archibald Dandridge and in his presence. Archibald Dandridge says, he never heard such conversation; but has frequently heard Payne speak of the deed, and that it was made in consideration of the relinquishment of dower by Mrs. Moore. Now, the above witness might have heard, and doubtless did hear, of such a deed; the consideration might have been

stated, as the other witness says always was the case, when the deed was spoken of in his presence; but this may have been forgotten by the other witness; and it might also have been said, and *properly* too, if the deed was *bona fide*, and for the consideration stated in the answers, that the object was to prevent creditors from taking the property, as they would have done, had the deed not been executed; leaving nothing for the wife.

The other depositions, exclusive of *Payne's*, tend to prove fairness in the transaction, and to corroborate the answers of both defendants; and the deposition of *Payne* proves, without doubt, if he is competent and credible, the defence set up.

If *Payne's* deposition is rejected, and in consequence thereof this deed is set aside, I can see nothing either in the form of this bill, or in the testimony, which can charge *Payne* with a combination to defraud creditors, or any thing that can lay him liable to the action of the creditors, or to a decree in this case. As to the hires, if he has paid them over *bona fide*, to his *cestui que trusts*, before notice of this suit, he is not responsible; and so far as he has not accounted, he is equally responsible to either party. But, nothing of this kind is put in issue, or alleged as a ground of charge against him; and, if he is responsible, it must be because, however fair his conduct, yet as his deposition cannot be read, the deed must be set aside, and he made responsible for damages; in other words, he being a material witness, and there being no other evidence in itself sufficient to support the whole defence; and as *without him*, the deed must be set aside, so he cannot be a witness. That is to say, a trustee cannot be a witness, if the cause or defence cannot be supported without him.

I do not think this is the law, and that therefore there is nothing in the second proposition above-stated.

The result is, that *Payne* is a competent witness. I think him also credible, and consequently the deed cannot

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be set aside; and so far the decree is correct. But, I am not prepared to say that the bill ought to have been dismissed.

It will be recollected, that at the time *Mosby* was examined, Mrs. *Moore* was a widow; and if she had not relinquished, would then have been entitled to dower; and he may have had in his mind, the value of a dower interest actually vested. On the other hand, a man involved in debt is about to sell his lands; and his wife will not unite. He will probably sell at a loss equal to the value of her dower, had it vested on his death. Sales of this kind must be at a loss. If the right had accrued, the purchaser could make a previous bargain with the dowress. But here, all is uncertainty. He may improve, and she knows not how the dower will be laid off, &c. I think, therefore, a husband can well afford to give a full price for such relinquishment, and that a jury or a commissioner, as the case may be, ought to do the same.

I am of opinion, that the decree, so far as it dismisses the bill, ought to be reversed with costs, against all the appellees except *Payne*, and the cause sent back to the Court of Chancery, to have the value of the dower interest, conveyed by the appellee *Ann C. Moore*, as well in the Hanover, as the King William land, ascertained; unless something shall appear as to the latter which ought to exclude them; and also the value of the property in the deed of trust; and that the appellant receive satisfaction of his judgment out of the latter, so far as it exceeds the former; on which excess, hires and profits are to be charged, if necessary; and to be proceeded in, to a final decree, according to these principles.

Judge CABELL.

This is a bill to set aside a deed of trust on the ground of fraud.

The principal difficulty in the case, is as to the competency of *George Woodson Payne*, the trustee, and one of the defendants in the cause.

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It is perfectly clear, that the mere circumstance of a man's being trustee, is no objection to his competency; nor is it any objection that he is a co-defendant; nor that he is both trustee and co-defendant.

The true question is, whether he is interested.

It is said, that fraud is odious, and that although a mere naked trustee may be a witness, yet it would be monstrous when a deed is impeached for fraud, in which the trustee participated, and for which he is liable, to permit him to support the deed by his own testimony.

All this is readily admitted. But, the odious nature of fraud is no reason that it should be imputed without proof. On the contrary, it is a strong reason, both in humanity, in justice and in the law, that it shall not be imputed to any person until it is first proved. *Circumstances*, it is true, will be received, and ought to be received, to establish it. But they must be such circumstances as the law regards as *proofs*. The mere allegation, by one party, that the transaction is fraudulent, will not suffice. Innocence is not to be blackened, nor just rights defeated by denunciations, however loud, if not supported by testimony.

The deed, in this case, shews no interest in the trustee. He ought, therefore, according to the general principle, to be admitted as a witness, unless it be otherwise shewn that he is incompetent. The ground alledged, here, is that the deed is fraudulent, and that the trustee participated in, and is liable for the fraud. But, in the language of Lord HARDWICKE, the allegation must be supported "by material evidence, such as the Court or a jury would lay weight on." *Dixon v. Parker*, 2 Vesey, sen. 219. Such evidence is wanting in this case. The circumstance mainly relied on by the appellant, is the difference between the consideration stated in the deed, viz: a future relinquishment of dower to be made by Mrs. Moore, and that stated

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by the witness, viz: a previous contract to relinquish her dower. But, this seems, to me, an unimportant circumstance. Both considerations were lawful, and either of them would be sufficient. There was, therefore, no motive for misstating the consideration expressed in the deed, and it was, in all probability, the result of inadvertence on the part of the trustee, or of the lawyer who drew the deed.

I see nothing in the record from which to impute censure to Mrs. Moore or her trustee. Moore was evidently a very improvident man. He was desirous of converting his real estate into money, which his wife and her friends thought might be wasted; and they wisely and justly insisted on an equivalent for Mrs. Moore's interest in the lands. That was effected by the deed of trust. Give to Moore's creditors all his estate; but do not take that of his bona fide alienees. This would not be allowed even as against an ordinary purchaser for valuable consideration. But what purchaser, even for valuable consideration, is more meritorious than a wife who, as the consideration of the purchase, has relinquished the fast hold which the law gives her on the real estate of her husband? On this point I refer to the strong cases of *Quarles v. Lacy*, 4 Munf. 251, and *Taylor v. Blanton*, Gilmer, 209.

Much stress was laid on what were said to be the acknowledgments of Mrs. Moore, and her trustee, *George Woodson Payne*. I will remark, that nothing is less satisfactory to my mind than a concession or acknowledgment deduced from the evidence of transient conversations. A single circumstance, or a single expression, misunderstood or not adverted to by the witness, will give to the conversation as detailed by him, an aspect entirely different from that which it bore as it fell from the party; and will lay the foundation for inferences which he never dreamt of. As to the declarations of Mrs. Moore, that her husband's property was unincumbered, they must be taken in reference to the subject matter of those declarations, his landed estate, and not the personal property,

which was the subject of the deed now in controversy. Besides, at the time when she made those declarations, the deed now in question had not been executed; and, therefore, even his personal property was free. As to the declarations of *Payne*, that the deed was made to protect the property from the payment of *Moore's* debts, in the first place, the evidence on this point is not free from doubt. But, admit it to be what the appellant wishes to represent it, still it proves nothing which can affect the validity of the deed. The declarations of *Payne* cannot, by any fair construction, when taken in connection with the other circumstances of this case, be considered as referring to the *consideration* of the deed. It is certainly true, that a deed made on no other consideration than a desire to screen the property which it conveys, from the payment of the debts of the grantor, is clearly fraudulent and void. But, if the deed be founded on fair and legal consideration, (as this was,) it is no objection to the validity of the deed, that the parties intended that the property should be no longer subject to the debts of the grantor. Such object, then, becomes just and legitimate, and is very often avowed in the deed itself. It is always so avowed in every correctly drawn deed of trust in favour of a married woman. In such a case, it is the very object which renders necessary the intervention of the trustee; and never was it more necessary than in the case now before us. The declarations, therefore, ascribed to *Payne*, not impeaching the *consideration* of the deed, prove motives perfectly consistent, both with law and equity.

The only circumstance entitled, in my estimation, to any weight, is, that the value of the property conveyed by the deed, exceeds, probably, the value of Mrs. *Moore's* interest in the lands. But, if it be excessive, the two cases above referred to, shew that the provision made for the wife, is to be disturbed to the amount of that excess only. The real value of her interest in the lands ought, therefore, to be ascertained; as also, the value of the property

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June.

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1824. conveyed by the deed of trust, in order, that if there be  
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*Contained in this Volume.*

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## SECURITY.

1. See *Injunction*, No. 2.

## SHERIFF.

1. See *Overseers of Poor*, No. 1.
2. If a Sheriff, before a judgment is obtained, makes an arrangement with the defendant, by which he (the Sheriff) undertakes, for a valuable consideration, to pay the debt to the plaintiff when the judgment is rendered and execution sued out, and returns "ready to render;" he will be considered as having "levied the debt" within the meaning of the statute; and if he fails to pay the plaintiff, the sureties in his official bond will be liable for his default, unless the plaintiff was privy to such arrangement. *Norris v. Crumney and others*, 323
3. A Sheriff cannot contradict his return, but must obtain leave of the Court to amend it. *Henry v. Stone*, 455
4. See *Bail*, No. 2.

## SLAVES.

1. See *Emancipation*, No. 1.

## SURETY.

1. See *Judgment*, Nos. 1, 2.
2. See *Sheriff*, No. 2.
3. The sureties of an executor are not responsible for the proceeds of land sold by him, under the will. *Jones v. Hobson*, 483
4. The sureties of an executor are not responsible for the acts of his executor, in the administration of the estate of the first testator. *Ibid.*
5. Where there are several sureties to a bond, and the principal conveys property in trust to indemnify some of them, and the rest are not provided for in the deed, the sureties who are so omitted shall, nevertheless, be protected by the deed of trust. *M'Mahon and others v. Fawcett and others*, 514

## T

## TRESPASS.

1. See *Malicious Prosecution*, Nos. 1, 2.

## TRUSTEE.

1. A trustee, holding the legal title, may maintain ejectment, even after the trust is satisfied. Although a *cestui que trust*, after the trust is satisfied, may maintain ejectment, that does not deprive the trustee, holding the legal title, of his right to

- maintain such an action. *Hopkins, &c. v. Stephens and others*, 423  
 2. See *Evidence*, No. 6.

U

USURY.

1. A tacit understanding between borrower and lender, founded on a known practice of the latter, to lend money at legal interest, if the borrower purchased of him a horse at an unreasonable price, is a shift to evade the statute against usury. *Douglas v. M<sup>r</sup> Chesney*, 109
2. See *Issue*, No. 1.

V

VENDOR AND VENDEE.

1. A purchaser who is evicted, is not entitled to compensation for improvements, unless the owner has been guilty of a fraud, by permitting such improvements, without giving notice to the possessor, or of gross laches in asserting his claim after he is apprised of it. *Morris v. Terrell*, 6
2. A conveyance of a particular tract of land, without a specification of quantity, does not bind the vendor to warrant a particular number of acres, if there has been no false representation, and no concealment of facts within his knowledge; although there may have been an expectation in both parties, founded on documents and other evidence known to both, that the number of acres is greater than it turns out to be, upon a subsequent survey. *Tucker v. Cocke, &c.* 51
3. See *Equity*, No. 5.

VOLUNTARY CONVEYANCE.

1. A voluntary conveyance of property to children, at a time when the donor is largely indebted, is void against creditors. *Chamberlayne and others v. Temple*, 384
2. A creditor cannot subject the property thus conveyed, by a suit against the donees, until he has established his demand at law, by obtaining judgment, and (in the case of personal property) by suing out execution against the donor or his representatives; or by shewing, by a settlement

- of the administration accounts, that there are no assets in the hands of the executor or administrator, to satisfy the debt. *Ibid.*  
 3. A voluntary conveyance is good between the parties, and only void as to creditors, who are thereby delayed, hindered, or defrauded. *Ibid.*

W

WARRANTS.

1. Warrants and surveys of land may be assigned, but not entries. *Morrison v. Campbell and others*, 206

WARRANTY.

1. Where a freehold estate has been conveyed with warranty, and the warrantee afterwards evicted, the proper measure of damages is the value of the land at the time of the warranty, and not at the time of the eviction. *Stout v. Jackson*, 132
2. *Quære*. Will an action of covenant lie on a mere real warranty? *Ibid.*
3. The best standard of value is, in general, the price agreed upon at the time of the sale. *Ibid.*
4. These rules apply equally to executed and executory contracts. *Ibid.*
5. Where a husband conveys the property of his wife, with warranty against the claims of himself and his heirs, his children, deriving title from their mother, will not be affected by the warranty. *Urquhart and others v. Clarke and others*, 549
6. The doctrine of collateral warranty examined. *Ibid.*

WILLS.

1. See *Probate*, No. 1.
2. See *Publication*, No. 1.

WRIT OF RIGHT.

1. If any portion of land described in the count in a writ of right is included in the patent under which the demandant claims, it is sufficiently identified. *Norvell v. Camm and others*, 68
2. See *Abatement*, No. 1.

## ERRATA.

- In page 66, the 11th line from the bottom, for *substratum* read *substance*.  
In page 131, the 4th line from the top, for 5 Co. 1196, read 119, b.  
In page 145, the 5th line from the bottom, put a full stop after the word *not*. It will then read, "but it is not. Every exchange implies," &c.  
In page 147, the 7th line from the top, for "many a year," read "many years."  
In page 151, the 12th line from the bottom, for *particular* read *general*.  
In the same page, and the last word, for *vendoe* read *vendee*.  
In page 152, the 11th line from the top, for "on covenants" read "one covenant."  
Same page, 14th line from the top, for *feared* read *found*.  
In page 195, 8th line from the bottom, insert *had* before *adopted*.  
In page 315, *Munford v. Overseers of Poor of Nettoway*, it is erroneously stated that there was "No counsel for the appellees." Mr. Spooner was counsel, and argued the case.  
In page 512, the 18th line from the bottom, for "reduce" read "secure."
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### *Errors and omissions in the First Volume of these Reports.*

- In *Lang v. Lewis*, p. 277, it ought to have been stated, that Judge GREEN did not sit in the cause, it having been argued before he came into the Court.  
In *Harwell v. Bennett and Walker*, p. 282, and in *Kinney's ex'rs. v. M'Clure*, p. 284, it should have been stated that Judge GREEN did not sit, for the same reason.  
In *Stubbs v. Whiting*, p. 322, it should have been stated that Judge GREEN did not sit, the appeal being from a decree pronounced by him.  
It ought to have been stated in *Royall v. Johnson*, p. 421, that Judge CARELL did not sit, and that Judge BROOKE concurred.  
In *Kidd v. Alexander*, p. 456, it ought to have been stated that Judge GREEN did not sit, the appeal being from a decree pronounced by him.  
In p. 361, the 12th line from the top, instead of "division" read "decision"; and in p. 373, the 13th line from the bottom, there is the same error.  
In p. 363, line 4th from the top, the words "is sought" should be inserted after the word "chargeable."  
In the same page, line 13th from the top, the period after the word "defendant" should be struck out, and inserted after the word "owner," at the end of the 14th line.  
In p. 365, line 3d from the bottom, the word "by" should be inserted instead of the word "before."  
In p. 370, line 21st and 22d from the top, the word "answerable" should be inserted instead of the word "censurable."  
In p. 371, line 12th from the top, the word "revivor" should be inserted instead of the word "review."  
In p. 394, line 10th from the bottom, insert "Dunton" instead of "Duncan."  
In p. 407, line 7th from the bottom, instead of a period after the word "patent," insert a comma, and place the period after the word "title" in the next line.  
In p. 422, line 12th from the top, insert "those" instead of "their."  
In p. 423, line 13th, insert "the payment of," instead of the words "pay off."  
In p. 427, line 7th, insert the word "for" instead of "but whether."  
In p. 428, line 8th, insert "Goods" instead of "Gorden."

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